In Re: Madhu

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Court : Karnataka

Decided On : Nov-25-1964

Reported in : 1966CriLJ223

Judge : A. Narayana Pai and ;T.K. Tukol, JJ.

Appellant : In Re: Madhu

Judgement :

A. Narayana Pai, J.

1. The appellant was the first accused in Sessions Case No. 27/8 of 1962 on the file of the Court of Session, Bidar. There were eight other accused persons tried along with him but they have all been acquitted.

2. The incident, in respect of which the said 9 persons came to be prosecuted, took place in the village of Sidhol in Humnabad Taluk on the evening of 19th March 1962 and resulted in the death of one Rama Rao, Police Patil of the village. The charges framed against the accused at the trial are therefore related to the murder of the said Rama Rao

3. As against accused 2 and 3, the charge was under Section 120B of the Penal Code alleging that they had conspired with the 1st accused to commit the murder of the said Rama Rao. They were acquitted of that charge.

4. As against accused 1 and 4 to 9, two charges were framed -- one under Section 148 of the Penal Code and the other under Section 302 read with Section 149 of the Penal Code on the general allegation that the said accused had along with one Pundalik said to be absconding and two other unknown persons had constituted themselves into an unlawful assembly armed with deadly weapons with the common object of committing the murder of the said Rama Rao and that in pursuance of the said common object, the death of the said Rama Rao was intentionally caused, On these charges, all the accused except the 1st accused were acquitted. The first accused-appellant before us was convicted on both the charges and awarded 2 years' rigorous imprisonment under Section 148 of the Penal Code and imprisonment for life under Section 302 read with Section 149 of the Penal Code.

5. There was a charge separately against the 1st accused under Section 19F of the Arms Act for having been in possession of a single barrel muzzle loading gun without a license in that behalf at the time of the murder of Rama Rao. As, however, none of the witnesses who spoke to the incident made mention of any gun in the hands of the 1st accused at the time of the offence, the learned trial Judge took the view that the mere fact that the gun described in the charge was discovered later in the residential house of the 1st accused was insufficient to enter conviction against him.

6. The 1st accused appeals against his conviction under Section 148 and under Section 302 read with Section 149 of the Penal Code. There is no appeal by the State against any of the acquittals.

7. The appellant and the deceased both be-longed to the village of Sidhol. According to the pro-section case there is a long history of enmity between them and it was due to such enmity that the appellant is said to have been responsible for the murder of Rama Rao along with or with the assistance of other persons.

8. Apart from the details to which we shall make a reference later, the actual incident described in more or less uniform terms by various eye-witnesses may be described as follows : On the evening of 19th March 1982, the 1st accused with others came to the house of Rama Rao who was then sitting on the front Katta of

his house along with Bhini Rao and Dhulaji examined as P. Ws. 9 and 10 respectively. The 1st accused entered the bunk, dragged Rama Rao out and dealt three blows on his head with an axe. After Rama Rao fell down, one of the persons who had come with him inflicted three injuries on the abdomen with a jambia or dagger. The 1st accused him-self is said to have entered the house in search of Rama Rao's son Shankar Rao P. W. 2 in order to kill him, but not finding him in the house he came out. By that time some villagers who had assembled around the house started pelting stones at the 1st accused and others apparently with a view to scare them away. But the 1st accused and his party tried to scare away the villagers by firing gunshots. Two persons, vis., Nagappa and Zareppa, who are said to have received gunshot injuries are also examined as P. Ws. 23 and 24.

9. Shankar Rao who was away in his garden land heard the reports of gunshots and returned home. At that time, his father was lying unconscious in front of the Wada or house. He died at about 1 A. M. Shankar Rao who says that he got all the de-tails from Bhim Rao P. W. 9 is the person who laid first information with the police at Humnabad the next morning at 7 A. M. That information is in the form of a Dharkast or petition and is produced as Ex, P-l. The only point about that petition which need be taken note of at this stage is that the only person who is actually named as an assailant of Rama Rao or the accused is the appellant. The names of other accused are not set out therein. It is puissant to this information that investigations were conduct-ed and the 9 accused arraigned before the Sessions Court as aforesaid.

10. The evidence is principally that of the eye witnesses. There is also considerable body of evidence relating to the previous enmity between the deceased on the one hand and the first three accused on the other.

11. Before proceeding to discuss the evidence, we might state the main lines on which the arguments on behalf of the appellant have been address-ed before us:

1. Although some criticism has been advanced against the evidence relating to motive, there is no serious attempt made, nor does it appear to be in the interest of the appellant, to make out that there was no enmity at all between the appellant

and the deceased;

2. The evidence of the eye-witnesses is sought to be discredited, not on the ground that their presence at the scene of occurrence is doubtful, but on the ground that certain answers elicited from them in their cross-examination taken along with the other evidence placed on record by the prosecution are sufficient to make out that the incident might have or in all probability must have taken place in a manner different from what is stated; and

3. Assuming that the evidence is believable or at any rate the general effect of the evidence may be taken to establish the murder of Rama Rao by some one or other of the members of the alleged unlawful assembly, the acquittal of the accused other than the 1st is said to have the legal effect of making it impossible to convict the appellant at any rate on the charges as framed,

* * * * *(After review of evidence the judgment proceeded)

12-43. On a consideration' therefore of :the entire evidence bearing on the incident and examining the evidence in the light of the arguments addressed before us, we do not think that there is any difficulty in agreeing with the trial judge that the incident took-place more or less on the lines spoken to by the witnesses. At any rate, there is no reason to doubt that the 1st accused-appellant before us dragged Rama Rao from the bunk of his house and dealt three axe blows on his head.

44. Before proceeding to discuss the legal argu-ments, we should refer briefly to the medical evidence in the case.

45. Dr. Shantvir Udgir P. W. 7 who conducted the autopsy on the body of Rama Rao noticed three injuries on the region of his head and three injuries on the abdomen. The first three he described In the following terms:

1. An incised wound in the centre of the head 2' x 1/2' bone deep with fracture of right parietal bone. There was fissured fracture of both tables present.

2. An incised wound 1' medial and behind the left parietal eminence 3'. x 4' bone deep with fracture of occipital bone on left side. The outer table was fissured.

3. An incised wound 2' behind the right parietal eminence 1' x 1/4' muscle deep.

These are the three injuries which can be attributed to the axe blows delivered by the appellant on the head of the deceased as spoken to by the eye-wit-nesses. The other three injuries on the abdomen were, according to the evidence, inflicted by a person whom the witnesses could not identify. Regarding the consequences of these injuries, the doctor clearly stated in his chief examination that in his opinion, injury No. 1 was sufficient in the ordinary course of nature to cause earth and so also all the injuries cumulatively. There was no cross-examination of the doctor on behalf of the 1st accused-appellant before us. In the course of cross-examination on behalf of accused 2 to 6, 7 and 9, it was elicited from him that injuries Nos. 8 to 6 were by themselves insufficient to cause death.

46. Now, the conviction of the appellant, as already stated, is on two charges framed against him and accused 4 to 9, one under Section 148 and the other under Section 302 read with Section 149 of the Penal Code. As set out in these charges, the persons who constituted the unlawful assembly w ere the appellant accused 4 to 9, one Pundalik and two other unknown persons making a total of 10 persons. Out of these, six have been acquitted, viz.i Accused Nos. 4 to 9. It is therefore argued that the clear legal effect of this acquittal is that the said six accused persons cannot be said to have participated in the offence at all and that therefore even if Fundable and the other two unnamed persons might have been members of an assembly along with the appellant lst accused sharing a common object with him, the assembly cannot be said to be an unlawful assembly because under Section 141 of the Penal Code there should be at least five persons to constitute an unlawful assembly and if therefore there was no unlawful assembly, the vicarious or constructive liability under Section 149 of the Penal Code cannot be placed on the 1st accused-appellant before us.

47. The general answer made on behalf of the State to this contention is that the acquittal of the six accused persons by the trial Court in the light of the evidence led before it and the discussion contained in its judgment cannot or must not be read as having the consequence of reducing the number of members of the unlawful assembly to less than five. It is contended that properly understood, the

position would be that the acquittal amounts only to a finding that the named six accused who have been acquitted are not shown to have been members of the assembly and not that the total number of persons who took, part in the offence was reduced by six.

48. Alternatively, the learned Government Pleader States that even if a conviction by virtue of Section 149 of the Penal Code may not be clearly possible in this case, the evidence relating to the exclusively individual acts of the 1st accused is sufficient to convict him alone under Section 302 of the Penal Code although there may not be a separate charge against him under Section 302 of the Penal Code.

49. For the proposition that the acquittal of an accused clearly amounts to a finding that he did not participate in the crime and that for all purposes of law the acquitted accused must be left out of account, reliance is placed on the ruling of the Supreme Court reported in Krishna v. State of Maharashtra : [1964]1SCR678 . Although that case dealt with a charge under Section 302 read with Section 32 of the Penal Code, the proposition of law stated in clear terms at page 1417 of the Report by their Lordships is the following:

When accused were acquitted either on the ground that the evidence was not acceptable or by giving benefit of doubt to them, the result in law would be the same; it would mean that they did not take part in the offence.

50. The circumstances in which less than five persons can rightly be convicted by virtue of Section 149 of the Penal Code are discussed in detail by their Lordships of the Supreme Court in Mohan Singh v. State of Punjab : AIR 1983 SC174 . After pointing out that there must be a clear finding that there was an assembly of five or more persons whether all the five of them are brought before Court and convicted or not--their Lordships indicated in paragraph 9 of their Judgment the principles on which less than five persons can rightly be convicted under Section 149 of the Penal Code. Their Lordships stated:.less than five persons may be charged under Section 149 if the prosecution case is that persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and unnamed assailants

or members composed an unlawful assembly those before the Court can be convicted under Section 149 though the unnamed and undine rifled persons are not traced and charged. Cases may also arise where in the charge the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are con-fined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the Court less than five persons to be tried then Section 149 cannot be invoked, Even in such cases it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named.

51. Reading these two decisions together, one thing which must be regarded as the clear starting point for discussion is that the acquittal of an accused, whatever may be the reason for the acquittal, must be regarded as amounting in law to a finding that he did not participate in the offence. The distinction, which the learned Government Pleader wishes to make between an acquittal amounting to a reduction in the total number of persons enumerated as constituting an unlawful assembly and an acquittal which does not so reduce the number but only is limited to a mistaken identity, also has to be examined in the light of the same proposition. He has relied in support of his contention on an earlier decision of the Supreme Court reported in Bharwad Mepa Dana v. State of Bombay : 1960 CriLJ424 .

In that case, there were originally 13 accused persons, Ono of them being a Juvenile, his case was separately tried and it is reported that the case ended in his acquittal. Out of the remaining 12, seven were acquitted by the trial Court and five convicted under Section 302 read with Section 149 of the Penal Code, The High Court upon appeal held that one of these five was not guilty but nevertheless sustained the conviction of the remaining four by virtue of Section 149, and that conviction was sustained by the Supreme Court which read the finding of the High Court as amounting to there having been an unlawful assembly of 10 to 13 persons and that the acquittals themselves did not have the effect of reducing the number to less than five.

That case was considered by the Supreme Court in the subsequent case of Mohan Singh : AIR 1963 SC174 referred to above and their Lordships stated the effect of that decision in the following term-):.it was held that there was no legal bar which prevented the High Court from 'coming to the conclusion that apart from the persons who were acquitted and excluding them, evidence adduced by the prosecution showed the presence of more than five persons who composed the unlawful assembly, The assembly about the existence of which the High Court has made a finding is not a new assembly but the same assembly as alleged by the prosecution.

This observation clearly makes out that in ascertaining the number of persons constituting the un lawful assembly the acquitted persons must be excluded. Whether the number still remains at five or more must depend upon whether the charge and the evidence confine the membership to a certain number of cam'd or enumerated persons, or either the charge or at any rate the evidence indicates that there might possibly be persons other than those named and enumerated in the charge who can rightly be described as having been the members of the un-lawful assembly referred to in the charge.

52. The finding in this case, according to the learned Government Pleader, must be said to contain in the following sentence appearing at the end of paragraph 34 of the trial Court's judgment:

The circumstance that be was armed with an axe and that the number of persons who came there along with him were more than five, clearly shows that he is guilty under Section 148 of rioting armed with a deadly weapon, besides murder under Section 302 read with Section 149 of the Indian Penal Code.

If this finding is read in juxta-position with the trial judge's acquittal of Accused Nos. 4 to 9 on the ground of inadequate identification, the position according to the learned Government Pleader, would be not different from the position in the case of : 1960 CriLJ424 already referred to.

53. On the contrary, the argument of Mr. Jagirdar for the appellant is that if one reads the charge, there can be no doubt whatever that according to the

prosecution, all the members of the unlawful assembly were present before Court except Pundalik and two others. In other words, he states that the unlawful assembly, according to the investigation of the police consisted of only ten persons and that that is also the effect of the evidence adduced by the prosecution. If that is the position, Mr. Jagirdar contends, the case cannot be assimilated to the position in Dana's case, : 1960 CriLJ424 .

54. We do not think that the sentence extracted from the trial Court's judgment can at all be read in the same way as the Supreme Court read the finding of the Bombay High Court in Dana's case : 1960 CriLJ424 . The clear terms in which the charge was couched supports the proposition of Mr. Jagirdar that the case of prosecution both In the charge and the investigation was that the assembly consisted of only ten members. It is also not possible, in our opinion, to say clearly that there is any basis in the evidence to suggest that even after excluding the six acquitted accused, the number of persons who might be said to have composed themselves into the unlawful assembly mentioned in the charge could be five or more.

55. This finding however, is not sufficient to acquit the 1st accused-appellant in the peculiar circumstances of this case. The evidence we have already analysed leaves no room for doubt that the death of Rama Rao was caused by the individual act of the appellant. Except the evidence of two wit-nesses who make a passing reference to a couple of companions of the 1st accused helping him while dragging Rama Rao down to the Katta, the evidence of the other witnesses is to the effect that even the first act of dragging was the separate Individual act of the 1st accused. In our opinion, the effect of the evidence is that both the act of dragging of Rama Rao and the inflicting of the first three injuries are attributable to the appellant alone.

56. The medical evidence makes it clear that one of the injuries on the head clearly attributable to the 1st accused was is itself sufficient in the ordinary course of nature to cause death. We have also pointed out that in his evidence the doctor has stated that the injuries on the abdomen for which the appellant was not responsible were insufficient in them-selves to cause death.

57. There is no reason therefore to think or hold that the responsibility for the killing of Rama Rao could or should reasonably be attributed to any person other than the appellant.

58. The legal effect of the absence of a separate charge under Section 302 of the Penal Code against the appellant should now be considered. The answer to this question should, in our opinion, be given in the light of the decision of the Supreme Court in William Slaney v. State of Midhya Pradesh : 1956 CriLJ291 . The relevant observations of their Lordships are the following:

Now, as we have said, Sections 225, 232, 535 and 537 (a) between them, cover every conceivable type of error and irregularity referable to a charge that can possibly raise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that 'Whatever' the irregularity it is not to be regarded as fatal unless there is prejudice....

la adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circum-stances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand....

59. The question therefore is whether, in the circumstance of this case, it is at all possible to say that the appellant was to any extent prejudiced by the absence of a separate charge under Section 302 of the Penal Code directed only against him.

60. The answer, in our opinion, could only be in the negative. It will be noticed that from the very commencement starting with Ex. P-l, the accusation has been against the 1st accused-appellant before us,

The evidence or the only evidence which the Court found to be acceptable is almost exclusively directed against the 1st accused-appellant. The earliest among

the witnesses examined to speak to the incident, viz., the daughters of the deceased Rama Rao, speak to nothing except the assault on their father by the lst accused, the rest of their evidence being of little importance to the development of, the case. The position in regard to the evidence of other witnesses is similar. At no time therefore can the appellant be reasonably said to have been left in any doubt about the case sought to be made against him on the evidence.

61. It has, however, been argued by Mr. Jagirdar that had there been a separate charge under Section 302 framed against the appellant, the cross-examination of the witnesses might have been con-ducted on different lines. He states that a charge under Section 149 of the Penal Code puts an accused on notice of only two things,--first, that the common object of the unlawful assembly was murder and second, that some member of that assembly committed the murder in pursuance of that common object, and not that the particular accused was guilty of the murder or that his act itself was sufficient to render him guilty under Section 302 of the Penal Code.

Cross-examination does not, in our opinion, appeal to proceed on any ignorance of the specific accusation against the appellant. Although the charge is under Section 149 and the charge in itself may not be said to put the appellant on notice that he himself was responsible for the murder, the evidence clearly and indubitably indicated that what the prosecution was going to prove was that the 1st accused delivered three blows with an axe on the head of the deceased Rama Rao. Cross-examination is conducted normally on the basis of the information elated in the chief examination. If the chief examination is clear as to the individual act of the appellant, we fail to see how the 1st accused or his counsel could say that there was no opportunity given to the 1st accused to controvert the specific accusation in the chief examination. Indeed, the attempt in cross-examination appears to have been confined to casting doubts on the evidence relating to identification.

We might also point out that the general argument addressed before us suggesting the possibility of there having been an encounter between Rama Rao and the eye-witnesses on the one hand and the dacoits on the other which is

sought to be supported on the basis of several detailed suggestions made to the eye-witnesses in cross examination, also indicates that the only way in which the case made out against the appellant in the chief examination of the several witnesses was sought to be met was by casting doubt on the identification of the accused by the witnesses.

62. It cannot therefore be said that the appellant was misled by the absence of a charge or that he had no opportunity to meet the case that was sought to be made against him, so as to suggest that he suffered any prejudice by the omission to frame a separate charge under Section 302 against him.

63. In the result, the conviction of the appellant under Section 148 of the Penal Code and the sentence of 2 years' rigorous imprisonment awarded to him in respect of it are set aside and the conviction of the appellant under Section 302 read with Section 149 of the Penal Code is altered into a conviction under Section 302 of the Penal Code alone, maintaining the sentence of imprisonment for late a yarded to him in respect thereof.