In Re: Ibrahim Ali

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Court : Andhra Pradesh

Decided On : Dec-09-1959

Reported in : AIR1960AP355

Judge : Bhimasankaram and ;Krishna Rao, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 350, 423, 509, 509(1) and 537

Appeal No. : Referred Trial No. 37 of 1959

Appellant : In Re: Ibrahim Ali

Advocate for Def. : Addl. Public Prosecutor

Advocate for Pet/Ap. : Abdul Khari Siddiqui, Adv.

Judgement :

Bhimasankaram, J.

1. The reference and the Criminal Appeal arise out of S. C. No. 21 of 1959 on the file of the Court of Session, Medak Division. The accused was tried for an offence under Section 302 I. P. C, and was convicted and sentenced to death by the learned Sessions Judge.

2. Before we go into the merits of the case, it is necessary to consider a point of law raised by the learned counsel for the accused and that point is this: The trial of the case began before the predecessor-in-office of the Sessions Judge whose judgment is now in question and the former had not only framed the charges but had recorded the evidence of one of the witnesses in the case i. e. the Medical Officer.

The present Sessions Judge continued the trial of the case from that stage and concluded it, and took on file the documents tendered. Learned counsel for the appellant argues, plating reliance upon the recent Full Bench decision of the Madras High Court in Fernandez, In re 1958-2 Mad LJ (Crl.), 665: (AIR 1958 Mad 571) (FB), that the conviction having been based on evidence partly recorded by one Sessions Judge and partly by another is void and should be set aside. Although the Full Bench decision is not binding upon us, it is pointed out, that it is based upon a number of earlier rulings of Divisional Benches of the same High Court which, in accordance with the rule laid down by this court in Subbarayudu v. State, : AIR 1955 AP87 (FB) are binding upon us. It must be conceded that the Full Bench decision favours the contention. There the learned Judges made the following observations which are in point:

'The ordinary rule in criminal matters is that the judgment may be delivered only by the person who has heard the whole of the evidence in the case. This principle is well established and has been firmly and consistently enforced. Vide In re, Guruswami Thevar, : AIR1951 Mad902 . The only exception is that created by Section 350, Criminal Procedure Code, which empowers a Magistrate to dispose of a case on evidence heard in part by himself and in part by his predecessor or predecessors. Even so, as the section stood before it was amended in 1955, it gave the accused person an unqualified right to demand a de novo enquiry or trial. That provision is evidence of the reluctance of the legislature to depart from the old familiar and cardinal principle of law to which we have just referred.'

Later in the same judgment occur the following remarks:

'The basic reason for Section 350, Criminal Procedure Code, appears in the decision in Tarada Baladu v. The Queen, ILR 3 Mad 112. What happened there

was this:

'The trial of this case was commenced before Mr. Happell, Officiating Agent, and with one exception all the witnesses were examined. The case was adjourned and endeavours were made to obtain the presence of persons named by the accused as witnesses; During the adjournment Mr. Garstin resumed his appointment, and having examined one fresh witness concluded the trial.' A Bench of this court observed:

"We are compelled to pronounce the proceedings void. It is only in view of the necessarily frequent changes in the office of Magistrate the Criminal Procedure Code provides specially that a Magistrate may pronounce judgment on evidence partly recorded by his predecessor and partly by himself, but there is no such provision in the case of Sessions Judgment. The conviction must be set aside and new trial directed.'

The desire to achieve a just balance between the interests of the accused, an expeditious trial and the frequency of changes in the personnel of the court of Magistrates, which itself was linked up with the needs of executive administration led to the enactment of Section 350, Criminal Procedure Code and its continuance thereafter. What we emphasise is that without such an express provision in the Code, the normal rule would have applied even in the courts of Magistrates that the entire oral evidence should have been heard by the judicial officer before he could pronounce judgment in a criminal case. What has been expressly made by Section 350 applicable only to a limited class of criminal courts out of those enumerated in Section 6 Criminal Procedure Code, cannot be extended without the sanction of the legislature, express or necessarily implied.'

The learned Judges were dealing with the case of a Judge officiating under the Criminal Law Amendment Act XLVI of 1952. They held that such a Special Judge occupies an anomalous position and he is neither a Magistrate nor a Sessions Judge, and as there is no express provision in the Act similar to the one contained in Section 350 of the Criminal Procedure Code, the accused had a right to demand a de novo trial when one presiding officer of that Court is succeeded by another during the trial of a case.

3. It is of interest to note that as pointed out in an earlier decision of a Divisional Bench of the same High Court in In re P. Alli Khan, AIR 1947 Mad 248, a similar rule seems to have been prevalent at one time with regard to civil cases. That at any rate was the view taken by an early Bombay case to be found reported in Naranbhai Vrijbukandas v. Naroshankar Chandrashankar, 4 Bom HCR AC 98 (103). There Tucker J. observed -- and the observations were concurred in by the other Judges as follows :

'It appears to me that one of the main underlying principles of Code of Civil Procedure is that, at an original trial, the Judge who decides the cause shallliave personally heard the evidence of the witnesses on whose testimony his judgment is to be based except in certain specified instances; and I cannot find that it is anywhere contemplated that a Judge of a Court of first instance should pronounce judgment on evidence taken before a predecessor in the same court, or before a Judge of any co-ordinate tribunal, from which a part-heard suit may have been removed.

I consider, therefore, that when a Judge of a Court of original jurisdiction, whose proceedings are regulated by the Code of Civil Procedure, dies, or is removed to another appointment, before the conclusion of a trial, or where a partially fried suit is removed from one court to another, the evidence of the witnesses, who have been examined by the court which commenced the inquiry must be taken de novo, unless the parties consent that the depositions already recorded shall be read at the hearing before the Judge or court on whom it will devolve to pass judgment.'

After quoting this passage, the learned Judges in AIR 1947 Mad 248 proceeded to remark thus:

'If that is the law with regard to civil suits, then the procedure for the conducting of criminal trials cannot be less strict; for it is even more necessary in criminal cases that the Judge who writes and pronounces the judgment should have seen the witnesses and heard the evidence for himself.'

They pointed out that Order 18 Rule 15 and Order 20, Rule 2, Civil Procedure Code modified the rule In civil cases and Section 350 of Criminal Procedure Code

altered it in regard to criminal cases. It would thus appear that the rule in its origin was not confined to criminal matters as one might be led to suppose from the remarks above extracted of the Full Bench of the Madras High Court. There is a considerable body of authority of some other High Courts also taking the view that a Sessions Judge who succeeds another in office cannot continue a pending trial in which part of the evidence has been recorded from the point where it was left by his predecessor but must start the case all over again. Vide Nga San Tin v. Emperor, AIR 1930 Rang 354, Ramchandra Naik v. Emperor, AIR 1947 Pat 428, Indore State v. Balwant Singh, AIR 1950 Madh-B 43 and Gopal Prasad v. The State, AIR 1954 Pat 543. Although the decision of the Full Bench of the Madras High Court is only of persuasive value to us, as already stated, the decisions in ILR 3 Mad 112 and AIR 1947 Mad 248 are binding upon us. But we think however that on the particular facts of this case, those decisions are not applicable.

4. Before we mention the point of distinction, we may observe, with great respect to the learned Judges who took the contrary view that it is difficult to accede to the proposition that there is such a principle as that enunciated in the early Bombay case above referred to that only the Judge who heard the evidence in a case should dispose of it. It can hardly be claimed that it is a rule of natural justice; for, if it were, it is violated by the provisions which enable an appellate court to exercise all the powers conferred on the trial court.

When In a civil case an appellate judge who has not heard the witnesses modifies or sets aside a decree or in a criminal case he quashes a conviction or sets aside an order of acquittal in each case rejecting oral evidence which has been accepted or acting upon that which has been rejected by the trial Judge who has recorded the depositions, it must be supposed that he does so because of express statutory exceptions. One would expect even a rule of procedure (if it is based upon natural justice) to cover all courts alike and not merely the trial court. We venture to think that the so-called cardinal rule of procedure was imported into India by Judges accustomed to English rules and without due regard to the circumstances of its origin; it was evolved in England in connection with jury trials, where the verdict of a jury -- which, for all practical purposes, was binding upon an appellate court -- should be based upon evidence heard by the members of the jury. There was in

the courts of that country no practice of oral evidence at a trial being recorded by the presiding judge who only took notes to help him in his summing up of the case to the jury. This practice obtained not only in criminal but also in civil cases triable by a jury.

It may be noted incidentally that in criminal cases Section 15 of the Criminal Justice Act, 1925 now enables a criminal trial in England to proceed with the consent in writing by or on behalf of both the prosecutor and the accused even in spite of the death or discharge of a juror, so long as the number of the members of the jury is not reduced below ten.

5. Conditions in India being altogether different it would seem neither necessary nor desirable to posit the existence of any such rule as underlying either the Civil or the Criminal Procedure Code. Chapter XL of the Criminal Procedure Code enables a court including a Magistrate to dispense with the attendance of any witness, to issue a commission for his examination and to receive the deposition of such a witness in evidence. These provisions clearly cut into the integrity of any such assumed rule.

It is not without significance that Section 350 Cr. P. C, as amended in 1955 does not recognise the right of an accused to ask for a de novo trial even before a Magistrate, the Magistrate himself being given, the discretion further to examine any of the witnesses whose evidence has already been recorded if he thinks it necessary to do so in the Interests of justice. This statutory provision does not seem to assume the existence of any such rule. The decision of the Supreme Court in Willie (William) Slaney v. State of Madhya Pradesh, AIR 1950 SC 116 at p. 122 seems to us to have some bearing upon this matter. Speaking generally of the effect of errors of proceedure, their Lordships say;

'Except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth. These go to the foundations of natural justice and would be

struck down as illegal forthwith.... Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice..... Thereal question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to 'substantial' denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural Justice.''

It is true that their Lordships were not dealing with the point we are discussing but the approach indicated therein seems to us to be relevant and Instructive. It would seem that according to their Lordships short of inherent lack of jurisdiction in a court as contemplated and provided by the Criminal Procedure Code there could hardly be any defect or error relating to the conduct or course of an enquiry or trial that could be said per se incurable to vitiate the result of proceedings in a criminal case.

6. We should like also to observe that the rigid enforcement of such a rule without regard to proof of prejudice will result in great inconvenience and hardship. It is not to be forgotten that quite a good number of sessions cases occupy a considerable length of time and if the death, continued illness or the transfer of the officer who is trying a case should necessitate the recommencement of the trial from its Inception it will occasion considerable waste of time and money, apart from inconvenience to parties and witnesses, not to mention the possibility of the witnesses being tampered with in the meanwhile. The matter may also be looked at from another point of view: Consider a case where some prosecution evidence has been recorded which is formal or which is not very material: Why, in such a case, one might venture to ask in the name of commonsense, should the case start all over again? Or suppose in a particular case, the prosecutor says --of course he would he a bold one who does so--that he is wilting that no reference should be made to the evidence until then recorded; should there bo a recommencement of the trial even then?

7. Even assuming therefore that such a rule does exist, it would he proper to hold that in the absence of proved or presumed prejudice to either the prosecution or

the accused, the verdict of the succeeding Judge upon the whole evidence should not be set aside. We think that there is much to be said for the view of the majority of the Full Bench of the former High Court of Hyderabad in State of Hyderabad v. Sidlingappa, AIR 1952 Hyd 66(FB) in which the learned Judges ruled that when a Sessions Judge acts upon evidence recorded by his predecessor, no question of jurisdiction is involved and that the infirmity thus arising is at the most an irregularity which would be cured by Section 537, Criminal Procedure Code.

8. We venture to doubt whether it is necessary to hold that in all such cases the proceedings are void and should, be set aside by the High Court without regard to any question of prejudice.

9. Having made these general observations, we want to make it clear that we rest our decision in the present case on the fact that the predecessor-in-office of the present Sessions Judge recorded the deposition only of the Medical Officer. Now Section 509 Cr. P.C. which seems to us to have a bearing upon this matter, reads thus:

'509 (1). The deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may he given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as witness.

(2) The court may, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition.'

This provision, expressly enables the court to receive in evidence the deposition of a Civil Surgeon or other medical witness under the circumstance specified therein. It would be the height of absurdity, in our opinion, to hold that when a deposition taken by a Magistrate or on commission is admissible, and can therefore be regarded as part of the evidence in the case, a deposition taken by the Sessions Judge could not be so treated by his saccessor-in-office. IF the rule enunciated by the Full Bench of the Madras High Court is to be regarded as rigid and inflexible, even a medical witness will have to be re-examined by a succeeding Sessions Judge. The cases in ILR 3 Mad 112 and AIR 1947 Mad 248 do not deal with such

situation. We are definitely of the opinion that this case is not, for the above reason, governed by the ratio of those decisions.

10. We, therefore, reject the contention urged by the learned counsel for the accused that we should order a retrial merely on the ground that the evidence of the Medical Officer in the present ease was taken by the predccessor-in-oifice of thepresent Sessions Judge who continued the trial and isposed of the case.

11. This brings us to the merits of the appeal. The case against the appellant is that he caused the death of his senior paternal uncle, Amir Ali at about 5-30 A. M., on the morning of 7th February 1959 in the village of Kohir. Both the accused and the deceased belong to the same village. There were disputes between them arising out of a partition of the properties belonging to their family.

12. In support of the prosecution case, there is the direct testimony of P. Ws. 3, 4, 5 and 6 and P. W. 3 is the widow of a brother of the deceased and is thus also an aunt of the accused. The houses of the accused, the deceased and P. W. 3 are close together. On the date of the occurrence P-W. 3 woke up at about 5.30 a.m., to perform her morning namaz and came out with a vessel to take water from the well in the common yard. She saw the deceased come out of one portion of his house and proceed to a portion of his house which was built recently, called the new house, by the witnesses. To reach it he was proceeding across the open space between the two portions. Seeing him, he stepped aside. He went and bent down before the door of the new house to open the lock. Ibrahim Ali, the accused, emerged from his house with an axe in his hand and hit the deceased with it upon the head. The deceased raised his hands and stood up crying. The accused gave a second blow which hit the out-stretched right hand of the deceased, He gave, a third blow too upon the head. The deceased staggered forward a few paces and fell prostrate near the wall. Even after the deceased had fallen, the accused was inflicting blows.

It was suggested to the witness in cross-examination that neither she nor the deceased was in the habit of performing namaz in the morning. She denied the suggestion. Moreover as regards the deceased, there is the evidence of P. Ws. 4 to 6 which shows that he was in the habit of doing morning namaz. There is

nothing to discredit the statement of the witness that she also is accustomed to do so. When asked why she stood by the side of the wall instead of proceeding to take water from the well, she explained that as the deceased was the elder brother of her deceased husband, she stood away out of deference, to avoid being noticed by him and that she was waiting tor the deceased to enter the new house. She was then questioned as to why she did not cry out when the accused was attacking the deceased. Her explanation was that she was too horrified and paralysed to speak or act.

The witness further explained that as soon as she could collect her wits, she proceeded to the house of Sadat Ali a pre-deceased brother of Amir Ali, the deceased, and reported to the inmates what had happened. It was suggested to her further that her son Abbas AH who has not been living in the village for nearly two years or so was on bad terms with the deceased and that she was giving false evidence against the accused in order that no suspicion relating to the offence might be directed against her son. She denied that her son Abbas Ali and the deceased were on bad terms; she also denied, that he was going about with an axe that he would kill the deceased^ with the assistance of the local Harijains.

It is true that the witness had stated before the Committal court that the deceased and her son were not on good terms. But the evidence in the case shows that Abbas Ali had on one occasion committed theft of a crop and that since then he had been absconding. It is not unlikely as the trial Judge suggests that this act of theft might have estranged the deceased from his nephew. Except for minor discrepancies of an immaterial nature, there is nothing to cast any doubt upon the credibility of this witness. The learned Judge has stated that on a careful consideration of her evidence, he was satisfied that she has testified truthfully.

13. Then there is the evidence of P. Ws. 4 to 6. It is true that all of them are infant witnesses aged between 12 and 13 years. But in the case of each of them, the Sessions Judge has appended a certificate that he was satisfied from their answers to his questions that they appreciated the difference between the truth and falsehood and that they realised the necessity to speak the truth.

14. P. W. 4 is a son of the deceased. He states that that morning he and P. Ws. 5 and 6, their servants, were awakened by his father for morning namaz. His father proceeded towards the new house and the witness followed him a few minutes later.

As he neared the new house, he saw his father lying face downwards near the wall and the accused beating him. When the witness ran forward to intervene the accused pushed him aside and he fell against the wall of the cattle-shed and was injured behind his left ear above his chest and upon his left wrist. Frightened, he ran into the house, awakened his mother and told her what had happened. It was suggested to this witness that he was not awakened at that time. But he demes it. The learned Judge states with regard to this witness too that there is nothing elicited in his evidence tending to cast any doubt upon his veracity. The learned Judge added:

'There is absolutely no motive on the part of P.W. 4 why he should testify falsely and none is suggested either. I felt that this child had given his evidence quite naturally and that he was not tutored. I am satisfied that P. W. 4 has proved that while his father lay prostrate face downwards near the well the accused Ibrahim Ali had hit the prostrate figure repeatedly with an axe'.

Next comes the evidence of Bhima, a Harijan servant boy. The deceased as usual awakened his son, the witness and the other servant (P. W. 6) that morning and went towards the new house. The witness proceeded towards the cattleshed while P. W. 6 went into the latrine. P. W. 4 was the last to come out of the house. The witness was gathering dung in the cattle shed when he heard the sound of blows and turning round saw the deceased lying prostrate before the well and the accused hitting him with an axe. He ran back into the house along with P. Ws. 4 and 6, and roused the deceased's wife. He was sent to the house of Sirajuddin, where Gori Bi, the daughter of the deceased was residing, to inform her of the incident.

There he met the police patel P. W. 2 who asked him what was the matter and the witness told him what had happened. It was suggested to P. W. 5 that he had not mentioned the name of the murderer to the police patel. But the witness denied

the suggestion. Further P. W. 2, the Police patel states that P. W. 5 told him that Ibrahim Ali, the accused, had killed Amir Ali. It is true that in Ex. P-3 the report of the police patel to the Sub-Inspector of Police it is not said that P. W. 5 had stated that Ibrahim Ali was the assailant, but Ex. P-3 definitely contains a statement that the accused was the culprit. The learned Sessions Judge was prepared to act upon the evidence of this witness and no reasons have been shown to us why his evidence should not be accepted.

15. We now come to the evidence of P. W. 6, Fakir Pasha, who testifies in almost similar terms. He speaks to being awakened by the deceased and then his going into the latrine. He saw the deceased bending down to open the locked door of the new house and the accused coming and hitting him with an axe. He saw P. W. 4 trying to intervene and being pushed aside. He swears that Bheema P. W. 5 was also witnessing the occurrence. He was asked in cross-examination whether he did not serve under the accused before he had taken up service with the deceased and was not beaten on one occasion by the accused for coming late. The witness admitted it but the learned Judge was not prepared on this account to disregard his evidence.

16. To sum up, in the learned Judge's view none or the P. Ws. referred to had any motive to give false evidence against the accused. He was satisfied that upon the testimony so given, it was established beyond any doubt whatsoever that it was the accused who had caused the death of the deceased.

17. We agree with this conclusion. Apart from this evidence, we may add that there is the evidence of P. Ws. 10 and 11 to show that the accused had a motive to attack the deceased. P. W. 10 states that two months before the incident, the deceased told him that the accused had used foul language against him. P. W. 11 the eldest son of the deceased also states that the accused was quarrelling with his father about some land charging the deceased with having taken fertile lands for his share while giving him useless lands.

There is also the further point that immediately after the occurrence the accused made himself scarce. The police came upon the scene almost at once because the police station was very near the place of occurrence. P. W. 16 the Sub

Inspector of Police stated that the accused was not to be seen in his house. P. W. 3's evidence also shows that immediately after the occurrence the accused ran into his house and taking his wife with hint left the village. The accused was only arrested five days later on the 12th February.

18. The prosecution also relies, it may be added, upon the recovery of an axe M. O. 3 and a blood-stained rug. The learned Judge was not however prepared to place much reliance upon these recoveries and in our opinion, it is unnecessary.

19. We may note that a point is sought to be made by the learned counsel for the appellant that in the inquest report it was stated that P. Ws. 4 and 6 swore that 'Ibrahim Ali etc', had killed the deceased. As pointed out by the learned Sessions Judge, the letters 'etc', in Ex, P-5 were added in the inquest report for some reason that is inexplicable. These words seem to have been added later. The Sessions Judge was inclined to think that correct use of English does not seem to be a strong point with the Sub Inspector and that the word 'etc.' was used rather loosely. In any case, we fail to see how it helps the accused.

20. We confirm the conviction of the appellant. We however think that the sentence of death is not called for in the circumstances of the case and we direct that the sentence of imprisonment for life be substituted therefor. With this modification, the appeal is dismissed. The reference is answered accordingly.