

In Re: Barla Joginadham

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Court : Andhra Pradesh

Decided On : Sep-21-1961

Reported in : 1962CriLJ523

Judge : Basi Reddy and; Munikanniah, JJ.

Appellant : In Re: Barla Joginadham

Advocate for Pet/Ap. : Mr. Adavl Rama Rao

Judgement :

Munikanniah, J.

1. This appeal has been preferred by Barla Joginadham, who was tried along with eight others for the murder of the Esum Nookayya. The appellant (A-1) alone has been convicted of the offence Under Section 304, Part I, IPC while the rest of the accused have been acquitted of all the charges against them.

2. The occurrence is alleged to have taken place in the field known as 'Peddagaru' in R. S. No. 103/2 in Naruvada village. The appellant claimed to be a lessee from D.W. 1 and maintained that he was In possession of that field (Peddagaru). A suit filed by the appellant (O. S.)to. 147 of 1958) as a lessee had been decreed ex pane but later on, at the instance of the deceased and his (lessors who were defendants to the suit, the ex parte decree was set aside and the suit was restored to file on the 34th August, 1959.' Thereafter (roughly a month

later) in the early hours of 24-9-1959, the appellant went with loughs to till the land. It is said A-I was sowing the field with horsegram. Just about that time, P.W. 1 came 11th persons and seven ploughs and began tilling the same field on the western portion. It is mentioned by the prosecution that, either because P.W. 1 the deceased awl others with their party objected to the accused ploughing or because they did not heed the obstruction caused by the appellant and his party to their ploughing on the western side, the matter came to a crisis and resulted In the appellant dealing a blow to the deceased with a stick. It is also said that as a result thereof Esum Nukayya received a fatal injury on his head and died thereafter.

3. The learned Sessions Judge found that the appellant had sufficient motive to attack the deceased. He also on to the conclusio that the appellant and his men mare engaged in defence of the possession of the property. But having regard to the provisions of Section 103 If he concluded that the right of the appellant did nt extend to the voluntary causing of death of tsum ftookayya. He went on to observe in para 16 of his Judgment thus:

So, the 1st accused had no right to cause the death of Nookayya when he and others trespassed into the land, it has to be seen if the 1st accused delivered the fatal blow M Nookayya in order to ward off the attack made on him or to any of his men. It is not even the case of the accused 4feat Nookayya beat or attempted to beat any of the member of their party. Further, the accused 2, 3, and 4 were not injured before the 1st accused gave the blow to Nookayya. After the exchange of hot words, the 1st accused dealt the blow on Nookayya and at a time when Nookayya did not attack any of his party and when there was no apprehension that Nookayya or any of the prosecution party would cause a grievous hurt to him or to the men of his. party. So, there is no doubt that the 1st accused exceeded the right of private defence of property.

The learned Sessions Judge also took the view that the instant ,case fell within exception 2 to Section 300, IPC although also 3rdly of Section 300, IPC would apply to it. He took the view that since the intention to cause bodily injury has thus been made out, A-I (the appellant) is liable to be punished Under Section 304, Part I, I. P. G. In the result, he sentenced the appellant to imprisonment for life.

4. Mr. Advl Rama Rao, learned Counsel for the appellant at the outset raised two contentions on behalf of the Accused. Firstly, he submitted that the conviction Under Section 304, Part I. IPC would be anomalous If, on the facts, it is possible for any court to arrive at the conclusion that the injury to the deceased had been caused in a fight between the accused and the prosecution parties. Secondly, he contested the conclusions of the lower court that the appellant was the first to beat the deceased and that this act of the appellant was not preceded by a fight between the parties. In other words, the learned Counsel argued that having regard to the statements made by P.Ws. 1 and 2 in Exs. p-2 and P-I respectively and also the prior statements of the witnesses to the police, the 'present version of the incident contained in the depositions of the witnesses before the court is worthless. According to him, different versions have been given by the prosecution witnesses in their earlier statements while they changed the same and gave garbled ones in the court in order to suit the opinion of the doctor that the fatal blow on the deceased could have been caused by one blow with a stick.

In support of this, the learned Counsel wanted to refer generally to admissions or denials made by the prosecution witnesses as to the making of the earlier statements and derive support in regard to those contradictions by merely referring to the depositions of the investigating officers, namely P.Ws. 21 and 22. As to the portions of the earlier statements which are sought to be relied upon as contradictions, they have not been marked as exhibits or found on record. The material omissions have not been brought out with reference to the particular passages. The accredited procedure by which these contradictions are brought home to the respective witnesses is by making the witnesses accept or deny the particular excerpt and then prove that those earlier statements were made, by examining the investigating officers. Time and again the importance of strictly confining to the provisions of Section 145, Evidence Act in making contradictions has been adverted to in decisions of this and the Supreme Court; but as more often its observance is in the breach, this dereliction has to be deprecated since it also results in deplorable lack of material for a correct and legal appreciation of the evidence.

The violation of the observance of the correct procedure, creates insurmountable difficulties. One such is, except it be that the witnesses denied the making of a statement which the investigating officer asserts as having been made there is no further proof of confronting the witness with the contradiction. Further, the court which has to take into consideration the statements of the witnesses contained in their depositions, is left with uncertainties, i.e., {without having to know which particular statement or portion of the statement was made use of as a contradiction and what the exact purport of it is and whether the confronting of such statement was really meant to be on each occasion to serve the very purpose of a contradiction or not if the purpose has been that the witness, without reference to any statement of his not reduced to writing is to be contradicted, the use of statements made before and brought out otherwise in evidence is legally permissible. But, in all cases where the contradiction is sought to be made out with reference to a statement reduced into writing, the appropriate procedure is contained in Section 145 of the Evidence Act. That Section reads:

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved but if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Any other procedure by which a written statement can be put in contradiction of a person deposing in court is not therefore, countenanced by the Evidence Act and much more so as this rule of confronting a witness with a portion of the proved statement recorded by the police officer finds special mention in the proviso to Sub-section (1) of Section 162, Cr.PC while the first sub-section of that Section places an embargo on the use of statements made to a police officer in the course of an investigation in any trial except as provided in the Criminal Procedure Code, exception has been made in the proviso as hereunder:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of

the court by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (I of 1872), and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

No doubt, the use by the accused of the statement or any part thereof made by any witness to the police is allowed when such a statement is duly proved in Court. Indeed, a statement could be said to have been proved only when it is spoken to by the witness to whom the statement has been made, and in the case of statements recorded in the case diary, the appropriate person who could prove the statement is therefore the investigating officer. Also from this it is obvious that any examination of an investigating officer for the purpose of speaking about the statements made by the witnesses to him would only have the effect of satisfying the first part of this proviso, namely, that the statement made to the police has been proved. But when a party does not proceed to take the further step viz. to contradict the witness with the record of the written statement or portion thereof as is provided under Section 145, Evidence Act, it cannot be said that the entire procedure provided for contradicting a witness with reference to his prior written statement has been followed. In the absence of such course being pursued by the party cross-examining the witness, it is not possible to assume that a contradiction has been put to the witness or the witness's attention has been called to the particular portion of his earlier statement or that the witness has been called upon to explain the same. It is therefore not only important but of utmost necessity to strictly stick to the procedure provided Under Section 145 of the Evidence Act. The difficulties caused especially to the appellate courts in reviewing the evidence in the judgments of the lower courts can be validly set down as another ground for insisting on following this salutary practice statutorily laid down. Even if it be taken that the trial court has satisfied itself by referring to the case diary that the contradictions are made out or found in the statements made by the witnesses on the prior occasions, the appellate court would always be at a disadvantage, unless the case diary is sent for and the same procedure of looking by itself is adopted. This we would consider, occasions waste of judicial time apart from introducing an element of speculation which it gives rise to.

Further, the appellate court cannot always be clear as to what particular portion had been really depended upon in the cross-examination as a contradiction or whether it is not making a mistake in treating any other portion as what was meant to be put to the witness. At any rate, as this course sometimes leads to a discussion in the appellate court, it is necessary to avoid such a controversy.

5. Because also of this uncertainty of affairs, we believe the following observations made in *In re Sambasiva-rao*, (1958) 2 Andh WR 627 (632), have become appropriate. At page 632, a Division Bench of this Court has reviewed the dicta relating to the desirability of observing strictly the procedure as laid down Under Section 145, Evidence Act. It reads:

From the above discussion, it would appear that all the High Courts are unanimous on the point that if it is intended to contradict a witness by the writing his attention must be brought before the writing could be proved, be called to those parts which are to be used for purpose of contradicting him. In our opinion, the proper procedure would therefore be to ask a witness first whether he made such and such statement before the police officer. If the witness answers in the affirmative, the previous statement in writing need not be proved and the cross-examiner may, if he so chooses, leave it to the party who called the witness to have the discrepancy, if any explained in course of re-examination. If on the other hand, the witness denies having made the previous statement attributed to him or states that he does not remember having made any such statement and it is desired to contradict him by the record of the previous statement cross-examiner must read out to the witness relevant portion or portions of the record which are alleged to be contradictory to his statement in Court or give him an opportunity to reconcile the same if he can. The best way of putting a statement is to put it in the actual words in which it stands recorded within quotation marks.

It could be seen that great emphasis has been laid on making the witness be aware of his previous statement and giving him an opportunity to explain the portion of the statement against him. Also by reproducing the particular portion in the deposition of the witness, there will be no room thereafter for ambiguities or uncertainties.

6. The Supreme Court had also averted to this. Subba Rao, J. has indicated the course and procedure that has to (be followed in making use of the provisions of Section 145, Evidence Act in making contradictions. The observations at page 1021 in the case reported in *Tahsildar Singh v. State of U. P.* : 1959 CriLJ1231 , not only clearly lay down the law but make it imperative that no court in this country could violate or overlook the procedure in making the contradictions. On the question whether Section 145, Evidence Act permits any loose procedure so as to allow latitude to the cross-examining counsel to put all questions, it is observed at p. 1021:

Section 145 of the Evidence Act, it is said empowers the accused to put all relevant questions to a witness before his attention is called to those parts of the writing with a view to contradict him. In support of this contention reliance is placed upon the judgment of this Court in *Bhagwan Singh v. State of Punjab* : 1952 CriLJ1131 . Bose, J. describes the procedure to be followed to contradict a witness Under Section 145 of the Evidence Act thus at p. 819 of SCR) : (at p. 217 of A.I.R.):

Resort to Section 145 would only be necessary if the witness denies that he made the former statement. In that event, it would be necessary to prove that he did, and if the former statement was reduced to writing then Section 145 requires that his attention must be drawn to these parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made. It is unnecessary to refer to other cases where a similar procedure is suggested for putting questions Under Section 145 of the Indian Evidence Act, for the said decision of this Court and similar decisions were not considering the procedure in a case where the statement in writing was intended to be used for contradiction Under Section 162 of the Code of Criminal Procedure. Section 145 of the 'Evidence Act is in two parts; the first part enables the accused to cross-examine a witness as to previous statement made by him in writing or reduced to writing without such writing being shown to him, the second part deals with a situation where the cross-examination assumes the shape of contradiction: in other words, both parts deal with cross-

examination the first part with cross-examination other than :by way of contradiction, and the second with cross-examination by way of contradiction only. The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to Section 162 of the Code of Criminal Procedure only enables the accused to make use of such statement to contradict a witness in the manner provided by Section 145 of the Evidence Act. It 'would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of Section 145 of the Evidence Act. Nor are we impressed by the argument that it would not be possible to invoke the second part of Section 145 of the Evidence Act without putting relevant questions under the first part thereof. The difficulty is more imaginary than real. The second part of Section 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate: A says in the witness box that B stabbed C; before the police he had stated that 'D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer.

Then at page 1023 we have the following:

'Contradict' according to the Oxford Dictionary means to affirm to the contrary. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross-examining counsel shall put the part or parts of 'the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the police officer in the sense we have indicated and the statement in the evidence before the Court are so inconsistent or irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other.

It is broadly contended that a statement includes all omissions which are material and are such as a witness is expected to say in the normal course. This contention ignores the intention of the legislature expressed in Section 162 of the Code and the nature of the non-evidentiary value of such a statement, except for the limited purpose of contradiction. Unrecorded statement is completely excluded. But recorded one is used for a specified purpose. The record, of a statement, however perfunctory, is assumed to give a sufficient guarantee to the correctness of the statement made, but if words not recorded are brought in by some fiction, the object of the Section would be defeated. By that process if a part of a statement is recorded, what was not stated could go in on the sly in the name of contradiction, whereas if the entire statement was not recorded, it would be excluded. By doing so, we would be circumventing the Section by ignoring the only safeguard imposed by the legislature, viz. that the statement should have been recorded.

However, the Supreme Court (as pointed out by the judges constituting the majority) have assigned the position of an omission by a witness to make mention in the earlier statement to that of contradiction in the following three cases or such like. They are: (i) When a recital is necessarily implied from the recital or recitals found in the statement, (ii) a negative aspect of a positive recital in a statement; (iii) when the statement before the police and that before the Court cannot stand together (vide p. 1026). Therefore, it is obvious that everything concerning the contradictions, relied upon by the accused must be found in the record so that the force of contentions of the accused may be judged aright without the scope for any play for conjectures. Further, it is needless to point out that when in any trial such a defect creeps in, it is possible to find fault with the trial since it becomes rather difficult to judge the veracity of the witness.

7. In the instant case, the way in which the earlier statements have been avoided without being brought on record and confronting the witnesses with the text of it in accordance with the accredited procedure, has created difficulties in properly appreciating the evidence and deciding upon probabilities. We are unable for the same reason to arrive at any definite conclusion as regards the contentions raised by the learned advocate for the accused. Again, the second question,

namely, whether the plea of private or self defence need not be considered in this case if the evidence is rejected for any reason arises. Therefore, it is necessary that for judging the facts the evidence before the Court is in a complete and understandable form, so that any weight to be given to the contradictions, could not be lost sight of. :

8. In this view, we are constrained to follow the only course that is available in the circumstances, namely to set aside the conviction and Sentence imposed on the appellant, namely accused-1 and to remit the case to the court of Sessions, Rajahmundry, for fresh trial. We direct bearing in mind that the appellant has been acquitted by the trial court itself of the offence Under Section 302, I. P. C., the fresh trial will pertain itself to the offence under Part I of Section 304, IPC only.

In the result, the appeal is allowed and the appellant (accused No. 1) is ordered to be tried afresh.

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