

(2015) 09 AP CK 0047

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 674 of 2010

Dasaru Veeraiah

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 02-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235
Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 1 ALT(Cri) 82

Hon'ble Judges : Nooty Ramamohana Rao and Anis, JJ.

Bench : Division Bench

Advocate : P. Prabhakar Reddy, for the Appellant

Final Decision : Dismissed

Judgement

Nooty Ramamohana Rao, J.—This appeal is preferred by the sole accused in S.C. No. 189 of 2001, who has been convicted for the offence under Section 302 IPC and sentenced to undergo imprisonment for life.

2. The case of the prosecution is that one Thotti Lachaiah S/o. Komaraiah R/o. Ramagundala was an organizer of CPI (ML) Phani Bagchi faction. On the day of the incident after taking dinner, he went to his agricultural fields to keep a vigil during night time for preventing attack on paddy fields by wild boars. His 11 year old son, who is staying in a social welfare residential school has been fetched by him the previous day from the school as the schools are closed for Dusserah holidays. Hence, he took his 11 year old son also to his agricultural fields for the night vigil. Further with a view to have a better vision of the entire field, a country made shaft, locally called as mancha, is erected in the agricultural fields. It is nothing but a raised platform. It is alleged that both the father and the son were lying on the mancha while the son covered himself with a blanket, the father was found to be awake and he was smoking a country made cigar. At around 12.00 in the night, the accused went to the agricultural field of the said Lachaiah and allegedly stabbed the said individual. It is also the case of the

prosecution that the said Lachaiah has pleaded with the accused not to cause any harm to his son. It is the prosecution case that the accused has stabbed Lachaiah indiscriminately and as a result of hemorrhage followed by shock, he died. It is the case of the prosecution that the accused once again went up the manch and extracted a promise from the 11 year old son of Lachaiah that he should not inform anyone about the true and correct facts of the incident and on the other hand, should inform the villagers that several people called "annalu" (a colloquial reference to naxalites) have attacked his father. It is also the case of prosecution that by that time it started drizzling and hence, accused has covered the son of Lachaiah with a plastic sheet so that he can save himself from getting wet from the rain. But, however, due to the winds blowing across the fields the plastic sheet fell off and after a while son of Lachaiah got wet and hence got down from the manch and went to the fields of the neighbours where they also erected a similar manch, but which has a cover as well. He went and has woken up the wife and husband duo of his neighbouring field and tried to sleep on their manch for a while. It is quite sometime later that the neighbours have questioned him because of their sensing smell of blood emanating from the son of Lachaiah. It is at that stage, the said son of Lachaiah has narrated the true facts to the wife and husband duo of the neighbouring fields. Ultimately, he came back to the village and narrated to his mother as to the incident, at the day break. When his mother and went to the fields, they have found Lachaiah died lying in the agricultural fields. That is how PW.1, wife of the deceased, complained to the police and set the investigation into motion.

3. We heard Sri Prabhakar Reddy, learned counsel for the appellant. Learned counsel has made his submissions with the theme of political rivalry existing in the village as the true reason for implicating the accused in the crime. Learned counsel has pointed out that the village was reeling under the influence of CPI (ML) party, but, however, the accused was supporting one faction while the deceased and his supporters are members of the other faction. Sri Prabhakar Reddy has therefore concentrated extensively on the various omissions noticed between the statements made initially by the witnesses during the course of investigation and the subsequent deposition of theirs before the Sessions Court.

4. Per contra, the learned Additional Public Prosecutor has pointed out as to how the witnesses are trustworthy and as to how they were truthful in narration of the facts to the extent that they are aware of.

5. Before we proceed any further, we consider that it would be appropriate to deal with one of the fundamental objections raised by Sri Prabhakar Reddy with regard to reliance to be placed on PW.2. Learned counsel would submit that PW.2 was only 11 year old at the time the incident took place and therefore, he is liable to be treated as a child witness and children of that young age are prone to be tutored or at any rate can be easily got influenced and they will not be knowing the importance and significance of not allowing others to influence their minds and keep the mind absolutely open. Therefore, Sri Prabhakar Reddy would

submit that while making assessment of the deposition of PW.2 great care and caution has got to be employed and every statement made by PW.2 must be looked for appropriate corroboration.

6. Learned counsel for the appellant has also at the very outset concentrated on other infirmity, in that the learned Sessions Judge has not examined the accused in terms of Section 235 of Cr.P.C. before sentencing him. The learned counsel for the appellant would, therefore, submit that for the substantive failure to comply with the principle enunciated under Section 235 of Cr.P.C., which is described as a fair and mandatory requirement of law by the Supreme Court in *Muniappan Vs. State of Tamil Nadu*, , the judgment of the Sessions Court deserves to be set aside.

7. It is true that Chief Justice Sri Y.V. Chandrachud (speaking for a Bench of 2 Judges) in *Muniappan Vs. State of Tamil Nadu*, , (Supra) has clearly brought out the principle behind Section 235 of Cr.P.C. by setting forth that it is the bounden duty of the Judge to cast aside the formalities of the Court scene and approach the question of sentence from a broad sociological point of view. At the stage of imposition of sentence, the Court should be aware that it is not merely the accused but the whole society has a stake and hence, the Court places itself, while on the question of sentence, is an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction. The Supreme Court, therefore, considered that failure to comply with the requirements of Section 235 Cr.P.C. is too gross and error of procedural work to be condoned.

8. The philosophy enshrined behind Section 235 of Cr.P.C., as was brought out in *Muniappan's* case is a salutary one. But, however, every legal principle has to be understood in the context and setting in which it came to be propounded and explained. The accused *Muniappan* has been charged with a double murder of his maternal uncle and his son. The learned Sessions Judge without examining him under Section 235 Cr.P.C. imposed the sentence of death penalty. That sentence was confirmed by a Division Bench of Madras High Court. It is in that context, *Muniappan's* Appeal came to be decided by Supreme Court, which ultimately found that the facts and circumstances of the case as held established do not warrant imposition of death penalty. In this context, it is appropriate for us to notice the judgment rendered by the Supreme Court in *Ram Deo Chauhan @ Raj Nath Vs. State of Assam*, . Justice K.T. Thomas, while concurring with the judgment, particularly of Justice R.P. Sethi has noted the relevant principle in the following words in para 33 of the judgment:

"Learned Judge has brought out that only 2 alternative sentences alone are permitted for imposition as for the offence under Section 302 IPC - imprisonment for life or with death. Hence, no court is permitted to award a sentence less than imprisonment for life as for the offence of murder. The normal punishment for the offence is life imprisonment and death penalty is now permitted to be awarded only in the rarest of the rare cases when the lesser alternative is

unquestionably foreclosed (vide *Bachan Singh Vs. State of Punjab*,). Therefore, when the Sessions Judge does not propose to award death penalty to a person convicted of the offence under Section 302 IPC, the learned Judge has observed that what is the benefit to be secured by hearing the accused on the question of sentence? However, much it is argued, reasoned the learned Judge, the Sessions Judge cannot award a sentence less than imprisonment for life for the said offence."

9. It is, therefore, appropriate for us to read the principle enunciated in *Ramdeo Chauhan's* case (Supra) simultaneously when we read the principle enunciated in *Muniappan's* case (Supra). Hence, the ratio laid down by the Apex Court in *Ramdeo's* case must be understood in the context of learned Sessions Judge proposing to impose the death penalty for the offence of murder. But, whenever the learned Sessions Judge is imposing the alternative and normal punishment of imprisonment for life, no failure of justice can be attributed for not adhering to the principles enunciated under Section 235 Cr.P.C. If this distinction is borne in mind, in the instant case, since the learned Sessions Judge has not considered it necessary to impose death penalty to the accused/appellant, the failure to question him with regard to sentence as is required by Section 235 Cr.P.C. cannot be considered as a fatal error.

10. This apart, the learned Sessions Judge has clearly recorded in the judgment that the accused was at large after the trial was over and when the case was posted for judgment. In those circumstances, the presence of the accused could not be secured for the Sessions Judge to comply with the requirement of Section 235 Cr.P.C. It is in fact, in his absence in the dock that the sentence came to be pronounced by the learned Sessions Judge. Therefore, this is not one of those cases where the principle enunciated in *Muniappan's* case (Supra 1) gets attracted, but on the other hand, the principle enunciated in *Ram Deo Chauhan @ Raj Nath Vs. State of Assam*, which becomes applicable.

11. This disposes of the objection of the learned counsel for the appellant with regard to failure to adhere to the procedure prescribed under Section 235 Cr.P.C.

12. Turning to the submissions of the learned counsel for the appellant with regard to the care that is required to be employed by us in the matter of evaluating the deposition of a child witness, we need to notice the following factual aspect. PW.2 was in fact examined by the Sessions Court on 17.12.2003 by which time he turned 25 years of age. He deposed that he studied Intermediate and thereafter discontinued his studies. It is, therefore, not a case where we can strictly treat PW.2 as a child witness. It is purely incidental that at the time when he has watched the offence being committed he was 11 year old. But by the time the case was taken up for trial after apprehending the accused, he has not only attained the age of majority but attained certain sense of stability in his mind as he was 25 year old.

13. All this apart, we have carefully applied ourselves to the deposition of PW.2.

He was fairly truthful and also faithful while narrating the events. It is not an unusual phenomenon for a person, who has witnessed the assault suffered by his own father, carrying its imprint on his mind caused by traumatic incident for too longer a period. After all, it is the father of PW.2, who has been killed in the incident. Therefore, we cannot apply the principles enunciated by the Supreme Court with regard to treating child witness and their testimony to the deposition of PW.2 in the instant case.

14. PW.1 is the wife of the deceased. She was not an eye witness as PW.2 came next morning and informed her as to what had happened in the intervening night. She spoke about that fact. But, however, PW.1 has categorically stated that the deceased has taken along with him, after finishing dinner, their son PW.2 for the night vigil. Therefore, presence of PW.2 on the day of the incident besides the deceased cannot be brushed aside. PW.2 has categorically stated that while he was lying on the mancha erected in their field, his father was in fact sitting on the mancha and around 12.00 in the night he was smoking a country made cigar. It is at that time the accused climbed the mancha and started stabbing his father indiscriminately even though his father was pleading with the accused not to kill him. PW.2 stated that at that point of time the accused questioned the deceased as to who is the other person lying on the mancha and the deceased has informed the accused that the other person is none other than his own son. PW.2 has also stated that the deceased begged not to kill or cause any harm to PW.2, which request the accused has conceded mercifully. PW.2 has further deposed that after his father has fallen off the mancha and suffering further injuries at the hands of the accused, the accused came back and climbed the mancha. It is stated by this witness (PW.2) then what followed in the following words:

"..... When I address the accused, as "anna" he told me that he was my "Babai" and also told me that he would not kill him and asked me to cultivate the land and to live peacefully. Then he took promise from me by asking me to place my hand in his hand and asked me to tell in the village that somebody killed my father and not to disclose his name and then went away....."

15. It is very clear that PW.2 was carrying every detail about the incident in his mind notwithstanding the fact that more than a decade has passed by the time he went into the box. PW.2 has also spoken of the attitude of the accused when he said that by the time the incident took place the sky was cloudy and it was also drizzling and so, the accused placed a polythene cover on him to protect him from rain and then the accused asked him to sleep and thus went away. It is after sometime due to the wind blowing across the polythene cover fell off and PW.2 took out his blanket, battery light and watch stick and got down from the mancha and went to the mancha erected in the neighbouring field belonging to PW.3. Initially he told PW.3 and his wife that he came there to sleep, and they also believed that this young boy may have come to sleep on their mancha because their mancha had some kind of cover to protect from rain whereas the mancha erected by the father of PW.2 did not have any such cover and it was

exposed to nature and elements. But, however, after sometime, because of the smell of blood emanating from the apparel of PW.2, PW.3 questioned him in that regard, PW.2 thus, feeling secure in the company of PWs.3 & 4 narrated what had happened to PWs.3 and 4.

16. This witness has been cross-examined extensively. During the course of cross-examination, this witness was tested as to whether his father has acted as a panchayatdar for the dispute involving the accused and the wife of PW.9. This witness has been very faithful when he gave the answer in the following words: "I do not know whether accused was illegally called to the panchayat alleging that, he has got intimacy with a woman and then he was illegally made to pay fine." At the time of the incident, this witness being of 11 or 12 year old may not be knowing exactly what an undesirable intimacy that may have existed between the accused and another women, who is the wife of PW.9. But, however, at the time of deposition he being a 25 year old person, he was tested by the defence for his truthfulness. In our opinion, this witness remained truthful.

17. PW.9 is the one who caught the accused when he was having an illicit relationship with his wife. It is he who brought the accused before the local panchayat, of which the deceased was a prominent member. PW.9 has categorically stated that the panchayatdars have imposed a fine of Rs. 4,000/- on the accused out of which Rs. 2,000/- was paid to PW.9 and Rs. 1,500/- to his wife and panchayatdars have appropriated Rs. 500/- for holding the panchayat. It is PW.9, who laid the foundation and developed the structure for the motive of the accused for committing the offence, apart from what PW.1 has stated in her deposition.

18. Learned counsel for the appellant has placed great emphasis upon the fact that both PWs.3 and 4 have turned hostile. Sri Prabhakar therefore would contend that if the deposition of PW.2 who was a child at the time of the incident is to be kept aside for a while, the 2 remaining witnesses PWs.3 and 4 having turned hostile, the conviction handed down to the appellant is certainly not justifiable.

19. We have carefully gone through the deposition of PW.3. He has stated that there was roof over their mancha and he and his wife, PW.4, were lying on their mancha erected in their agricultural field and there was also rain during that night. He also stated that there is no roof over the mancha of the deceased. PW.3 has admitted that PW.2 came to their mancha in a drenched condition. He therefore thought that PW.2 came to their mancha as he was drenched in the rain and as mancha erected by his father did not have the roof, PW.2 came to their mancha for sleeping. He, therefore, allowed him to sleep on their mancha. What PW.3 stated thereafter has some relevance to our inquiry and that statement reads as under:

"..... I sensed blood smell from PW.2 and then I questioned him why there was smell from him. Then he told me that somebody killed his father then we

went to the village informed in the village and then all the villagers came to the field and saw the dead body....."

20. Thereafter, PW.3 has also stated as under:

"..... The villagers and the relations of PW.2 questioned him who killed his father, then PW.2 told them that accused killed his father....."

21. To the extent that PW.3 has made the above statements, he cannot be treated as a hostile witness in as much as, to this extent the deposition of PW.3, is also in accord with what PWs.1 & 2 have deposed. Hence, PW.3 is concerned, to the above extent is trustworthy and liable to be placed reliance upon by us. It is therefore very clear that from the beginning PW.2 has maintained as to who exactly killed his father on the day of incident. Therefore, the contention canvassed by Sri Prabhakar Reddy that due to passage of long time from the date of the incident, the narration of events made by PW.2 should be discounted for the possible improvements or for that matter the effect of dilution, the passage of the time would have caused, cannot be accepted.

22. The theory propounded by Sri Prabhakar Reddy that the village is a faction ridden village while the accused is owing his political alliance to one particular faction, the deceased was supporting the other, did not provide enough material for us to discount the participation in the crime by the accused as alleged. There is no reason for PW.2 to unnecessarily implicate the accused in the crime from the very beginning. From the very inception as we have already referred to, he does not really know for what reasons his father has been done to death by the accused. We are therefore not convinced that because of political factions in the village, the accused was unnecessarily implicated.

23. We have also perused the post mortem examination report carried out by PW.12. PW.12 who conducted post mortem on 09.10.1991 has recorded 13 injuries on the deceased. He has also found the internal injury to the left lung which showed multiple laceration while the right lung showed irregular laceration on the medial aspect. The blood was seen in both the thoracic cavities. Further, the heart of the deceased has shown a punctured wound. PW.12 hence opined that death of the deceased was due to shock and hemorrhage and due to multiple stab injuries.

24. We are, therefore, of the opinion that this appeal is without any merit and the various contentions canvassed including the failure to get serology test conducted on the shirt of PW.2 at the time of incident is not such a fatal lapse to discredit in any manner the conviction handed down to the accused. We therefore have no hesitation to dismiss the appeal.

25. Accordingly, this criminal appeal is dismissed.

26. Consequently, miscellaneous petitions, if any, pending shall also stand dismissed.