
(1971) 03 AP CK 0008
In the Andhra Pradesh High Court

G. Venkayya and Others

APPELLANT

Vs

S.H.O. Ongole Town P.S. Ongole and Another

RESPONDENT

Date of Decision : 11-03-1971

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 173
Penal Code, 1860 (IPC) — Section 109, 147, 148, 149, 302

Citation : (1972) CriLJ 439

Hon'ble Judges : Lakshmaiah, J

Bench : Single Bench

Judgement

Lakshmaiah, J.—This criminal miscellaneous petition is filed u/s 561A of the Code of Criminal Procedure (referred to hereinafter merely as the Code) seeking the quashing of the charges framed in P. R. C. No. 5 of 1970 on the file of the Judicial Second Class Magistrate. Ongole against the petitioners u/s 302 read with Sections 147. 148. 34. 149 and 109. I. P. C. by the committal order dated 26-11-1970. committing the petitioners to Sessions.

2. The petitioners were charged by the police with having committed offences punishable u/s 302 read with Sections 147. 148. 34. 149 and 109. I. P. C. The case of the prosecution was that at about 9 A.M. on the morning of June 23. 1970 one by name Srinivasa Rao. the deceased and his brother Ramakrishna were going along the street when the petitioners rushed to the place, of whom petitioners 3 and 4 caught hold of Sreenivasa Rao, the deceased the 4th petitioner exerting the 1st petitioner to stab the deceased whereupon the 1st petitioner whipped out the pen-knife from his waist and stabbed the deceased on the back and that petitioners 3 and 4 kicked the deceased on the abdomen while petitioners 2. 5, 6, and 7 threatened Ramakrishna to beat him. While being taken in a rickshaw to the Government Hospital, the deceased succumbed to the injuries and died even before, the Medical Officer came and saw him.

3. The Lady Assistant Surgeon who. conducted the post-mortem examination on that very day itself found that the injury on the deceased was a simple one and

that it did not cause death and that the death according to her might have been due to shock as there were no traces of poison found by the Serologist in the viscera sent to him. The Serologist detected 86 mgs of ethyl alcohol in the blood sample sent to him.

4. The body of Srinivasa Rao was stated to have been examined on 1-7-1970 at the instance of the police and some persons interested in the deceased who were not obviously satisfied with the opinion given by the Lady Assistant Surgeon. One Dr. Prem Chand on 1-7-1970 conducted second autopsy.

5. Copies of documents u/s 173(4) of the Code were supplied to the accused. The prosecution examined four witnesses who spoke to the actual commission of the offence as having witnessed the same. The case was enquired into as P. R. C. No. 5 of 1970 by the Judicial Second Class Magistrate. Ongole who, as per the order dated 26-11-1970 committed all the petitioners to take their trial in the Court of Session. Guntur and Ongole divisions for the offences punishable under various Sections of the Indian Penal Code adverted to heretofore.

6. Smt. Sithamalakshmi, learned Counsel appearing for the petitioners in this case submits that the charges framed against the petitioners are liable to be quashed and that the first petitioner alone according to her, is liable to be proceeded against that too only u/s 323 I. P. C. even according to the prosecution case. The learned Counsel submits that the post-mortem certificate. Ex. C. 1 issued by the Lady Assistant Surgeon showed only one simple injury and though her opinion was to the effect that the said injury could not have caused the death and that though the Serologist's certificate shows that, the deceased consumed alcohol which could have caused the shock resulting in the, death of the deceased, the learned Magistrate instead of relying on her opinion, based his committal order purely on the so-called medical certificate of Dr. Prem Chand who conducted the second autopsy and the certificate given by Dr. Prem Chand was not marked at all and that Dr. Prem Chand himself was not examined for the prosecution as a witness and the conclusion arrived at by the learned Magistrate are vitiated by the above said two circumstances.

The procedure adopted by the learned Magistrate according to the learned Counsel, was illegal and is opposed to the provisions of the Code. When the injury caused to the deceased by the 1st petitioner being a simple one according to the learned Counsel the 1st petitioner alone should have been charged u/s 323. IPC at best for causing a simple injury. There is no valid ground for the learned Magistrate not to, rely upon the evidence of the Lady Assistant Surgeon and to rely upon the medical opinion of Dr. Prem Chand who conducted the second autopsy and whose medical opinion was not placed on record and who was not even examined by the prosecution. It was finally submitted that the exhumation itself is illegal and as such the entire proceedings are vitiated and are bad in law and the committal order was prejudicial to the petitioners there being no evidence at all to support the charges and that the entire proceedings constitute sheer abuse of the process of the court.

7. The learned Public Prosecutor submits on the other hand that as many as four eye witnesses were examined in this case who speak to the factum of the occurrence and when the testimony of the Lady Assistant Surgeon was found to be not satisfactory the second autopsy was conducted by Dr. Prem Chand after exhumation and the learned Magistrate after having got. the documents u/s 173(4) of the Code supplied to the accused and after having examined four eye witnesses along with the Doctor's testimony being of the opinion that there is a prima facie case, committed the petitioners to the Sessions and when the evidence adduced is susceptible of yielding to more than one opinion, the Magistrate has no option excepting that of committing the petitioners to Sessions and in answer to the contention raised by the learned Counsel appearing for the petitioner to the effect that the learned Magistrate, while passing the committal order practically tried the case, the learned Public Prosecutor submits that what the learned Magistrate did was intended only with a view to enabling him to arrive at a conclusion as regards the existence of a prima facie case.

8. The Lady Assistant Surgeon who was examined as C. W. 1 said that the death was due to shock and she based her opinion on the observation that the injury caused was only 1/2" in depth and that the chemical examination did not disclose any poison in the blood except alcohol in it. But Dr. Prem Chand who conducted second autopsy found an injury of 11 cm. in depth. But, he says that it is not possible to say whether it is ante mortem or post-mortem as the body was found in a decomposed state. The autopsy by Dr. Prem Chand was on 1-7-1970 nearly one week after the death and that autopsy was conducted on the body after exhumation. The learned Counsel for the petitioner submits that the body of the deceased was not only subjected to ravages of time in tropical climate but that the place where the body was buried was not guarded by the police and in view of the fact that Dr. Prem Chand could not give his opinion as regards the injury being postmortem or ante-mortem though he was of the opinion that the injury was of 11 cm. in depth, the learned Magistrate erred in weighing the evidence and in proceeding as if he was trying the case which was outside the province of the enquiry. But. according to the learned Public Prosecutor, as has already been noticed, the learned Magistrate was merely trying to know whether there was a prima facie case and he was not in fact supposed to have been trying the case at all, especially in view of the fact that after having had the advantage of knowing the evidence of the four eye witnesses as a corroborative piece of evidence he was discussing the medical opinion.

9. According to the learned Public Prosecutor, if the learned Magistrate is satisfied that there is a prima facie case, that is sufficient for him to commit the case to the Sessions and even if the likelihood of there being more than one opinion being entertained with respect to some matter in them, even then he has no option excepting that of committing the case to Sessions.

10. Reliance was palced by the learned Public Prosecutor upon a decision in

Rajpal Singh and Others Vs. Jai Singh and Another, where the Supreme Court speaking through Shelat J. while discussing the scope of the enquiry in Chapter XVIII of the Code observed thus:

This Court added that in each, case the Magistrate holding the preliminary enquiry has to be satisfied that a prima facie case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit and if he is not so satisfied, he is not to commit. where, however, much can be said on both the sides, it would be for the Sessions Court and not for the Magistrate to decide which of the two conflicting versions will find acceptance at its hands.

It was further observed there that the Magistrate holding an inquiry under Chapter XVIII is not expected to act merely as a recording machine and is entitled to sift and weigh the materials on record for the purpose of seeing whether there is sufficient evidence for commitment and not whether there is sufficient evidence for conviction.

11. The learned Public Prosecutor, relying upon this submits that what the learned Magistrate did in this case was only sifting and weighing the materials on record for being satisfied that there is sufficient evidence for commitment only and not for conviction and as such there is nothing wrong in the committal order.

12. The other decision relied upon by him Bipat Gope Vs. State of Bihar, wherein Hidayatullah, J. (as he then was) speaking for the Court said while commenting upon the scope of the enquiry conducted by committing Magistrate that the Magistrate shall have to commit the accused to the Court of Session to stand his trial if there is a prima facie case and in that enquiry the committing Magistrate has to find out whether there is any evidence which, if believed, will establish, at least, a prima facie case,

13. Yet another decision of the Supreme Court was relied upon by the learned Public Prosecutor in R.P. Kapur Vs. The State of Punjab, wherein Gajendragadkar, J. (as he then was) explicating the inherent power of the High Court u/s 561-A of the Code observed thus:

It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily Criminal Proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory, stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings.

Instancing particular cases, his Lordship proceeded further thus:

Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction u/s 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court u/s 561-A in the matter of quashing Criminal Proceedings and that is the effect of the judicial decisions on the point.

14. The case of *Khushi Ram v. Hashim* AIR 1959 SC 542 decided by the Supreme Court was relied upon by the learned Public Prosecutor to emphasize the distinction between the absence of legal evidence and the absence of reliable evidence in the context of invoking the jurisdiction of the High Court u/s 561-A of the Code seeking the quashing of the proceedings. Gajendragadkar, J. (as he then was) observed at page 543 thus:

The distinction must always be drawn between absence of legal evidence and absence of reliable evidence. If it could be said with justification that there was no legal evidence at all in support of the prosecution case it may lead to the inference that the commitment was bad in that it was not based on any legal evidence at all. But on the other hand where circumstances are relied upon to show that the evidence may perhaps not be delivered, they do not lead to the inference that there is no legal evidence on the record.

15. The foregoing decisions establish the following propositions;-

(i) The Magistrate holding the preliminary enquiry has to be satisfied that a *prima facie* case is made out against the accused before he commits the case to Sessions.

(ii) He does not act while holding the enquiry merely as a recording machine but he is entitled to sift and weigh the material on record for the purposes of ascertaining whether there is sufficient evidence for commitment and not for the purpose of ascertaining whether there is sufficient evidence for conviction.

(iii) When much can be said on both sides, it. is for the Sessions Court and not for Magistrate to decide which of the two conflicting versions is acceptable,

(iv) Ordinarily Criminal Proceedings initiated against an accused person must be tried under the provisions of the Code and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage.

(v) In exercise of its jurisdiction u/s 561-A of the Code, the High Court would not. embark upon an enquiry as to whether the evidence in question is reliable or not. that being the function of the trial Magistrate, the distinction between the absence of legal evidence on the one hand and the absence of reliable evidence on the other being too vital and fundamental to be ignored or to be lost sight of.

16. Bearing in mind the aforesaid principles we shall have to see whether the proceedings in this case are liable to be quashed.

17. As per the case for the pro-sedition, the petitioners rushed to the place where the deceased along with his brother Ramakrishna were there. Petitioners 3 and 4 caught hold of the deceased. The 4th petitioner extorted the 1st petitioner to stab the deceased and the 1st petitioner whipped out the pen-knife from his waist and stabbed Sreenivasa Rao. the deceased on the back and petitioners 3 and 4 kicked the deceased on the abdomen, while petitioners 2. 5, 6 and 7 threatened Ramakrishna to beat, him. The deceased was taken in a rickshaw to the Government hospital and he died there even before the medical officer came and saw him,

18. Copies of documents u/s 173(4) of the Code were supplied to the accused. As many as four witnesses for the prosecution were examined to speak to the factum of the actual occurrence. The petitioners were examined on the evidence of eye witnesses, P. Ws. 1 to 4 and the contents of documents u/s 173(4) of the Code. There is the testimony of the lady Assistant Surgeon examined here as C. W.]. The eye witnesses were cross-examined by the defence. According to C. W, 1, the injury was not sufficient to cause death. On the basis of that, the learned Counsel for the petitioners submits that at best the case that could be said to have been made out is only an offence of simple hurt. There is a second autopsy conducted by Dr. Prem Chand according to whom the injury is 11 cm. in depth whereas according to C. W. 1 it is only 1/2" in depth. Dr. Prem Chand was no doubt not definite about the injury being either post-mortem or ante-mortem. No reliance according to the learned Counsel appearing for the petitioners, can be placed upon the opinion of Dr. Prem Chand as the same is not reliable. Whether or not a particular testimony is reliable is a matter that can conveniently be tested and gone into at the time of the trial before the Sessions Court. There is evidence to show that there is a prima facie case. Suffice it for the learned

Magistrate to commit the case on that basis without the need to go into the question of whichever version is true as regards the medical testimony. Besides that, there is the testimony of four eye witnesses. Under those circumstances, he is justified in committing the petitioners to Sessions for trial.

19. A much clearer picture would emerge only after the trial before Sessions Court is over and at this interlocutory stage, it is not either desirable or expedient to interfere with those proceedings. The learned Counsel appearing for the petitioners vehemently argued that the learned Magistrate practically took upon himself the onerous responsibility of trying the case by weighing the evidence. On a superficial glancing through the committal order it appears that the learned Counsel is justified in so arguing but on a close scrutiny of the said committal order it appears that what the learned Magistrate did was only an attempt to sift and weigh the evidence in order to enable him to come to the conclusion whether or not there is a prima facie case.

20. Under these circumstances, I am of the opinion that there are no merits in this petition and the petition deserves to be dismissed and it is accordingly dismissed.