
(1971) 04 AP CK 0006
In the Andhra Pradesh High Court

Kumar and Another

APPELLANT

Vs

The State of Andhra Pradesh

RESPONDENT

Date of Decision : 06-04-1971

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 103
Evidence Act, 1872 — Section 27
Explosive Substances Act, 1908 — Section 3, 5
Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (1972) 1 AnWR 159 : (1973) CriLJ 403

Hon'ble Judges : Venkateswara Rao, J;Obul Reddi, J

Bench : Division Bench

Judgement

Obul Reddi, J.—These two appeals. Criminal Appeal No. 288 of 1970 preferred by the State, and Criminal Appeal No. 887 of 1969 preferred by the two appellants (A-1 and A-2) arise out of the judgment of the Additional Sessions Judge. Hyderabad in SC No. 62 of 1969 on his file.

2. The facts necessary for the disposal of these two appeals, may be briefly set out. A section of the students joined the agitation started for a separate State for Telangana area. The Commissioner of police had issued Prohibitory Orders banning all kinds of meetings and processions without his prior permission. A meeting of "Telangana Praja Samithi" was held on 6.4.1969 and there was police bandobust to prevent any untoward incident. The case of the prosecution is that A-1 and A-2 and A-4 had conspired to hurl explosives at the police parties stationed for "Bandobust" in the disturbed areas of Secunderabad. These three accused sought the co-operation of A-3 who is said to have experience in the preparation of explosives. Pursuant to the conspiracy hatched by A-1 to A-4, they obtained the necessary material for preparation of bombs or explosives, and are said to have made 13 country bombs. Pursuant to the conspiracy and also in furtherance of the common object. A-1. A-2 and A-5 are said to have thrown bombs on a police van stationed at Rashtrapati Road, Secunderabad causing injury to a Wireless-Operator and damage to the van.

A case was registered against them u/s 307 of the Indian Penal Code and Section 3 of the Indian Explosive Substances Act. Another incident took place on 20.4.69 at about 8-30 P.M. when A-1 and A-2. in furtherance of their common object are said to have thrown two country-bombs on the Central Reserve police men stationed at R.M.S. Office Secunderabad causing injuries to some constables. A case was also registered against them u/s 307 IPC and Section 3 of the Indian Explosive Substances Act. The third incident was on the intervening night of 3rd and 4th May, 1969. That was also the result of the conspiracy to which A-1 and A-2 were parties. A-1 and A-2 threw two bombs on a police-van and that resulted in the death of a constable by name Syed Farooq Ali and injuries to a head constable. As a result of the explosion, damage was caused to the police van too.

A case was registered against A-1 and A-2 under Sections 302 and 307 of the Indian Penal Code and Sections 3 and 5 of the Indian Explosive Substances Act. The 5th City Magistrate, before whom the charge-sheet was laid against A-1 to A-5 committed them to take their trial in the Court of Session at Hyderabad. The learned Sessions Judge framed as many as 16 charges against the accused but he found, on a scrutiny of the evidence on record, that except charge No. 16 the other charges were not made out by the Prosecution and therefore, he acquitted the accused of the rest of the charges and while acquitting A-3 to A-5, he convicted A-1 and A-2 against whom charge No. 16 was framed, u/s 5 of the Explosive Substances Act and sentenced each of them to three years" rigorous imprisonment. It is against their convictions and sentences that A-1 and A-2 have preferred the appeal (Crl. Appeal No. 887 of 1969). The appeal Preferred by the State (Criminal Appeal No. 286 of 19701 is against the acquittal of A-1 and A-2 under charges Nos. 10, 12 and 14.

3. The charge No. 10 relates to causing the death of Syed Farooq Ali a constable of the Central Arm Reserve by A-1 and A-2. by hurling explosives i.e. two country bombs, on the Police van in which he was on duty on the intervening night of 3rd and 4th May 1969. Under charge No. 12. A-1 and A-2 are indicted u/s 307 read Section 34 of the Indian Penal Code for attempting to cause the death of a constable by name Syed Mohd. Hussain. The charge No. 14 refers to A-1 and A-2 using explosive substances, i.e. two country bombs, by hurling them on the police van, which resulted in causing damage to the Police van. Therefore, they were charged u/s 3 of the Indian Explosive Substances Act.

4. Before advertng to the appeal preferred by the State, it may be necessary to deal with the appeal preferred by A-1 and A-2. The case of the prosecution against the appellants A-1 and A-2 rests entirely on the statements which each of them (A-1 and A-2) made u/s 27 of the Indian Evidence Act. and the recoveries made in consequence thereof by the investigating officers, in addition to the opinion expressed by the Inspector of Explosives that the objects recovered and sent to him for examination, contained explosive substances.

5. A-1 was arrested by P.W. 52 the Assistant Commissioner of Police, on 7.5.1969

and after arresting him he handed him over to P.W. 53 the Inspector C.C.S. Team I. On 4.5.1969. P.W. 52 received a telephonic message regarding explosion in Secunderabad area. Under his instructions P.W. 53. the Inspector of Police, conducted a panchanama of the damage caused to the Police-van as a result of the explosion. P.W. 53 registered the FIR in the case. After A-2 was handed over to him and before he interrogated him he sent for two panchas P.W. 33 and another. When questioned in the presence of P.W. 33 and another by P.W. 53. A-1 came out with the statement which P.W. 53 reduced into writing. This statement is Ex. P-44 and it reads:

If you follow I will set the bomb recovered from my house....

6. A-1 then led P.W. 53, P.W. 33 and another to his house. There A-1 entered one of the rooms of his house. Picked up a key from underneath a tin-box, opened a tin-box and produced from that tin-box M.O. 15. This was seized by P.W. 53 under Ex. P-45 attested by P.W. 33 and another. Then M.O. 15 was put in a container and sealed. P.W. 53 then entrusted the sealed tin containing M.O. 15 to the Central Crime Station for safe custody under Police-guard.

7. We may now refer to the recoveries made at the instance of A-2. P.W. 51 is the Inspector of Police working in the Central Crime Station who apprehended A-2 at about 3-00 P. M. on 8.5.1969. At about 3-15 p.m. he sent for two witnesses. (P.W. 34 and another) and in their presence interrogated A-2, A-2 then came out with a statement which P.W. 51 recorded and the admissible portion of it is Ex. P-46 and it reads:

If you follow me I will point out the said six bombs concealed by me....

8. We may at this stage point out that Mr. Mathews the learned Counsel appearing, for the appellants (A-1 and A-2) sought to contend that Exs. P. 44 and P-46 cannot be strictly construed as statements admissible u/s 27 of the Evidence Act. We shall consider this aspect of the case at the appropriate stage if necessary.

9. After the statement was recorded by P.W. 51, A-2 led P.W. 51, P.W. 34 and another to his house. There, the accused made them follow to the kitchen portion of his house and there he dug out the earth, and showed them "six bombs buried there." All these six objects recovered from the house of A-2 were put in a tin and sealed in the presence of P.W. 34 and another. Ex. P-47 is the panchnama written on that occasion. P.W. 34 says that no slip of Paper with his signature and the signature of the other witness was affixed to the objects recovered at the instance of A-2, but a slip was attached to the tin in which the six objects were kept and sealed and he had signed that slip.

10. We may at this stage refer to Section 5 of the Explosive Substances Act under which A-1 and A-2 have been convicted and sentenced and its application. It reads:

Any person who makes or knowingly has in his possession or under his control

any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object shall unless he can show that he made it or had it in his possession or under his control for a lawful object be punishable with transportation for a term which may extend to fourteen years to which fine may be added, or with imprisonment for a term which may extend to five years to which fine may be added.

11. Under this section it is enough if the prosecution is able to establish that a reasonable suspicion exists against an accused person that he has made, or knowingly has in his possession, or under his control, any explosive substance and that, he is not in possession of such substance for any lawful object. The burden is upon the accused person, once it is shown that what he made or was in his possession is an explosive substance, to establish that he made it or had in his possession, for a purpose which is lawful. "Explosive substance" as defined in the Act:

...shall be deemed to include any materials for making any explosive substance also any apparatus, machine, implement, or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance also any Part of any such apparatus, machine, or implement....

12. The burden shifts to the accused person only if the prosecution is able to establish that what the accused person made, or was in possession is an "explosive substance." Therefore, to attract Section 5 it must first be shown by the prosecution that what was recovered from the accused persons, i.e. A-1 and A-2, as a direct result of the information furnished by them in their statement u/s 27 of the Evidence Act, was "explosive substance." Mr. Mathews the learned Counsel for the appellants contended that the prosecution has failed to establish even assuming without conceding that A-1 and A-2 did make statements attributed to them, that the items sent to the Chemical Examiner, or to the Inspector of Explosives (P.W. 43) were the identical objects that were seized from their respective houses. It is also the complaint of Mr. Mathews that the searches and seizure have not been made in accordance with the requirements of Section 103, Criminal Procedure Code and that, the evidence adduced by the prosecution is not sufficient to establish that the recoveries effected at the houses of A-1 and A-2 were, in fact "explosive substance."

13. The object of Section 103 Criminal Procedure Code is to see that searches are made properly by the investigating officers and it is for that purpose that the section lays down that it shall be obligatory on the part of the investigating officers to call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and that, the search shall be made in their presence and a list of all things seized in the course of such search, and the place at which they were respectively found, shall be prepared by such officers or other persons and signed by such witnesses. The

object of making it peremptory on the part of the police officers to make the search in the presence of respectable inhabitants is to ensure that the Police officers or those who are charged with the duty of conducting searches, conduct them properly and do no harm or wrong such as planting of articles by any interested parties, and prevent fabrication of any false evidence. The presence of two respectable witnesses is insisted upon by this provision to act as a safeguard against unfair dealings and to protect and safeguard the interest of the accused persons.

Admittedly, in this case, though the witnesses to the search and seizure describe the objects recovered by the police at the instance of the accused persons as "bombs" that does not bring them within the meaning of "explosive substance" unless examined by one competent to opine whether it is an explosive substance or not. It is for the competent analyst, like the Inspector of Explosives, to say or opine whether the substances recovered by the police are "explosive substances" or not. It is true that certain objects had been sent to P.W. 43 the Inspector of Explosives, for examination and opinion, through the Chemical Examiner Government of Andhra Pradesh, and he also opined that the objects sent to him contained an explosive mixture of Arsenic Sulphide Potassium Chlorate and Sulphur. Ex-P-75 is the opinion given by him. It is not enough if the prosecution is able to establish that the objects examined by P.W. 43 were found to contain explosive substance, and it has further to establish that what was examined by him (P.W. 43) were the identical objects that were seized from the houses of A-1 and A-2 on the information furnished by both of them under two separate statements.

14. We may point out that the prosecution has not been able to show that the material objects recovered from the respective houses of A-1 and A-2 were the identical objects examined by the Inspector of Explosives. This conclusion of ours is borne out by the evidence of the investigating officers themselves. After examining the evidence, the judgment proceeded:

As already adverted to it is to safeguard the interest of the accused that Section 103. Criminal Procedure Code makes it peremptory on the part of the investigating officer to make a search in the presence of two respectable witnesses and obtain their signatures to the search list, as also to the Panchnama. Therefore, the prosecution evidence gives room to considerable doubt as to whether, what was sent by P.W. 53 to the Chemical Examiner, and through him to the Inspector of Explosives, were identical objects that were recovered from the houses of A-1 and A-2 in direct consequence of the information furnished by them in their respective statements. The failure to break open the seals in the presence of those witnesses before whom the seals were put, and whose signatures were obtained on the slips pasted to the sealed tins, is a serious infirmity and omission in the prosecution case throwing considerable doubt whether the substances which were found to be "explosive substances" by the "Inspector of Explosives Substances" were the identical

substances that were recovered from the respective houses of A-1 and A-2 on the strength of the information furnished by them in their statements made u/s 27 of the Indian Evidence Act A-1 and A-2 are therefore entitled to the benefit of doubt.

15. The next question to be considered is whether there is any reliable evidence which calls for our interference with the order acquitting A-1 and A-2 of charges 10, 12 and 14. After discussing the evidence, the judgment proceeded:

Therefore, we are in agreement with the findings recorded by the learned Additional Sessions Judge that the evidence placed by the prosecution is not sufficient to hold beyond reasonable doubt that A-1 and A-2 are guilty of charges Nos. 10, 12 and 14 framed against them.

16. In the result the appeal preferred by A-1 and A-2 (Crl. Appeal No. 887 of 1969) is allowed and the convictions and sentences passed against them by the Additional Sessions Judge under charge No. 16, are set aside and they are acquitted. The appeal preferred by the State (Crl. Appeal No. 286 of 1970) is dismissed.