
(2007) 05 MP CK 0019
In the Madhya Pradesh High Court

Motiram Ramchandra

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 17-05-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 211, 212, 213, 214
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2008) CriLJ 259

Hon'ble Judges : S.L. Kochar, J;Manjusha P. Namjoshi, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.L. Kochar, J.—The appellant has challenged his conviction under Sections 302 and 325 of the Indian Penal Code and sentence of imprisonment for life with fine of Rs. 500/-, in default of payment of fine to suffer additional S.I. for one month and to suffer R.I. for two years with fine of Rs. 500/-, and in default of payment of fine to suffer additional S.I. for one month respectively as passed by the learned First Additional Sessions Judge, Mandleshwar by his judgment dated 3-12-1997 in Sessions Trial No. 285/ 98.

2. Briefly stated, the facts of the prosecution case as unfolded before the trial Court are that on 21-7-96 at 5.00 p.m. in the evening the complainant P.W. 1 Kalu and his father Tulsiram (the deceased) had gone to their field for spraying of pesticides and ploughing the field. At that moment, the appellant and acquitted accused persons were grazing their cattle nearby the field of Tulsiram. The accused persons drove their cattle in standing cotton crop of the deceased. On asking by the deceased to take the cattle out, the accused persons started quarrelling. The appellant Motiram was having axe and other accused persons were having lahi, doliya and stone in their hands. All the accused persons surrounded Tulsiram and started beating. The appellant Motiram dealt an axe blow on the back portion i.e. scapula region (spine area) because of which Tulsiram fell down on the ground. P.W. 1 Kalu tried to rescue his father and he

too was assaulted by the accused persons. After assault, the accused persons fled away. P.W. 1 Kalu regained consciousness and reached to his father. He saw a big wound on the back portion of the deceased, blood was oozing and he was dead. Thereafter, P.W. 1 Kalu came to the village and disclosed about the incident. Tulsiram was taken to the Government Hospital Kasrawad for treatment. Police was intimated by the doctor. On the basis of the report lodged by Kalu, Crime No. 257/96 was registered. The police, after inquest inquiry, prepared spot map and sent the dead body for post-mortem examination. P.W. 6 Dr. Ramesh Kumar Yadav conducted the post-mortem examination on the body of the deceased on 22-7-1996. The post-mortem report is Ex. P/3. P.W. 8 Dr. S.K. Gupta examined P.W. 1 Kalu and issued MLC report Ex. P/8. He was also referred for x-ray examination and the x-ray report Ex. P/5 was given by Dr. Anil Kandiya (P.W. 7). The appellant and the acquitted co-accused persons were arrested. On disclosure statement of the appellants axe was seized and the same was sent for opinion and Ex. P/4 answer to query was given by the doctor. Clothes of the deceased, axe, blood stained and controlled earth were sent to the Forensic Science Laboratory. One axe (Article A), blood stained earth (Article-B) and clothes of deceased Tulsiram (Article-D-1 to D-5) were containing blood. These articles were sent for further test to the Se-rologist, Calcutta, but its report was not received hence could not be filed by the prosecution in the Court. On completion of investigation, five accused persons were charge-sheeted for commission of offences punishable under Sections 302, 307, 147, 148 read with Section 149 of the Indian Penal Code.

3. The accused persons denied the charges. Their defence was that probably there was quarrel between Tulsiram and his son P.W. 1 Kalu and Kaluram might have assaulted his father. The learned trial Court, while acquitting the four other accused persons finding the appellant guilty of the offence sentenced him as indicated hereinabove.

4. Learned Counsel for the appellant made his submission in two folds namely (1) That the appellant could not have been convicted for commission of the offence punishable under Sections 302 and 325 of the Indian Penal Code simpliciter in absence of specific charge to this effect though the law requires that for every distinct offence of which a person is accused of, there shall be a separate charge and every such charge shall be tried separately except in cases mentioned under Sections 219, 220, 221, 222 and 223 (in the old Code of Criminal Procedure of 1898). These sections are equivalent to Sections 234, 236, 237 ad 239 of the New Code of Criminal Procedure and (2) that even if the complete prosecution case is accepted, the offence against the appellant at the most would be made out u/s 326 of the India Penal Code for causing axe blow on non-vital part of the body i.e. back portion of the deceased.

5. As against this, learned Counsel for the State has submitted that the conviction of the appellant cannot be said to be per se illegal in absence of specific charge under Sections 302 and 325 of the Indian Penal Code unless he is

able to establish failure of justice and causing of prejudice thereby in the light of the provisions u/s 464 of the Code of Criminal Procedure. Learned Counsel in support of his contention, placed reliance on the Supreme Court judgments rendered in the case of Dalbir Singh Vs. State of U.P., , Radha Mohan Singh @ Lal Saheb and Others Vs. State of U.P., , Atmaram Zingaraji Vs. State of Maharashtra, and Kammari Brahmaiah and Others Vs. Public Prosecutor, High Court of A.P., .

6. Having heard learned Counsel for the parties and after perusing the entire record carefully, there cannot be any dispute looking to the charge framed by the learned trial Court against the appellant along with other four acquitted co-accused persons that against the present appellant, no charge was framed for commission of offence under Sections 302 and 325 of the Indian Penal Code simpliciter. To resolve the controversy, it would be apposite to reproduce the charges framed against the appellant which are extracted as under:

(Vernacular matter omitted....Ed.)

Similar charges were also framed against the four acquitted co-accused persons. The argument of the learned Counsel for the appellant is based on the Division Bench judgment of Delhi High Court in the case of Dal Chand @ Dalia Vs. The State, . In this case, the appellant Dalchand was convicted by the trial Court u/s 302 of the Indian Penal Code though no separate charge was framed against him for this substantive offence. The charges were framed against the appellant under Sections 147, 148, 302 read with Section 149, 307 and 324 read with Section 149 of the Indian Penal Code and the learned Division Bench relying upon the Supreme Court judgment passed in the case of Suraj Pal Vs. The State of Uttar Pradesh, and relying on and discussing the Supreme Court judgments passed in the case of Nanak Chand Vs. The State of Punjab, and the Constitutional Bench rendered in the case of Willie (William) Slaney Vs. The State of Madhya Pradesh, as well as Ishwar Singh Vs. State of U.P., , held in para 12 as under:

It is crystal clear that no hard and fast rule or guidelines can be laid in this respect and every case must depend on its own merit, the problems being essentially one of prejudice to the accused resulting from omission to frame a specific charge.

7. We have perused the entire record and the judgments referred in para 6 and 5 above. The key case is the Constitution Bench case of Five Judges Willie (William) Slaney Vs. The State of Madhya Pradesh, in which their Lordships have decided on reference whether there was any conflict of view between the case of Nanak Chand Vs. The State of Punjab, and His Lordship Bose J. on his behalf and on behalf of S.R. Das acting C.J. observed in last sub-para of para 56 that:

We agree with some of the expressions used in the judgment appeared to travel wider than this, but in order to dispel misconception we would now hold that the true view is one we have preponderated at length in the present judgment.

8. The Supreme Court while discussing the provisions of framing of charge right from Sections 221 to 239 of the old Code of Criminal Procedure, equivalent to these sections in the new Code of Criminal Procedure, 1973 find place in Chapter XVII from Sections 211 to 223 and Sections 235 and 557(6) of the old Code of 1898. In the new Code, Section 464 corresponds to Sections 535, 232, 536(6) of the old Code held, that merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge, including in mis joinder of charges unless in the opinion of the Court of appeal, confirmation of revision a failure of justice has in facts been occasioned thereby the trial would not vitiate. The Constitutional Bench has specifically held that no conviction shall be deemed "invalid" merely on the ground that no charge was framed unless that "in fact" occasioned a failure of justice. The accused is to establish that because of absence of charge or a specific mistake in it, the prejudice has been caused to him and the question of prejudice is to be decided, on the basis of the facts and circumstances of individual case. The Supreme Court held in para 45 as under:

In adjudging the question of prejudice the fact that the absence of charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere, but if, on a careful consideration of all the facts, prejudice or a reasonable and substantial likelihood if it, is not disclosed the conviction must stand, also it will always be material to consider whether objection to the nature of the charge, or a total want of one, was taken at an early stage.

If it was not, and particularly where the accused is defended by counsel AIR 1930 57 (Privy Council) , it may be a given case be proper to conclude that the accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted no further particulars, provided it is always borne in mind that no "serious defect in the mode of conducting a trial can be justified or cured by the consent of the advocate of the accused. AIR 1927 44 (Privy Council) .

But these are matters of fact which will be special to each different case and no conclusion on these questions of fact in any one case can ever be regarded as precedent or a guide for a conclusion of fact in another, because the facts can never be alike in any two cases however alike they may seem. There is no such thing as a judicial precedent on facts though counsel, and even Judges, are sometimes prone to argue and to act as if there were.

9. In the case at hand, the provision u/s 464 of New Code of 1973 regarding effect of omission to frame or absence of or error in charge would be applicable, for convenience, the same is extracted below:

464(1) No finding, sentence or order by a Court of competent jurisdiction shall

be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of, an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

Provided that if the Court is of opinion that facts of the case are such that no valid charge could be preferred.

against the accused in respect of the facts proved, it shall quash the conviction.

In the above mentioned section, another change has been made in the old proviso that a retrial in the event of an error etc. in the charge should not be mandatory unlike in the old Section 535. In this connection, the Law Commission observed thus:

We are of the opinion that a retrial should not be mandatory as at present in several reported cases, the Courts have in the interests of justice refrained from ordering a retrial, as for instance, when the accused has already undergone sufficient punishment or when the evidence was considered insufficient to support a conviction. It would be better to make the provision for ordering retrial discretionary so that a Court could pass an order appropriate in the particular circumstances of a case.

10. In the light of the aforesaid legal position, now we consider whether in the facts and circumstances of the present case any prejudice has been caused to the appellant or a failure of justice has in fact been occasioned thereby. There is no controversy on the fact that the appellant was defended by an Advocate of his own choice and at the stage of framing of charge or during the course of examination of the prosecution witnesses, final arguments as well as at defence stage, no objection was raised by the appellant regarding non-framing of charge against him for his individual act. In the First Information Report lodged by the complainant injured witness Kalu (P.W. 1), son of the deceased Tulsiram, it is specifically mentioned that (Vernacular matter omitted....Ed.). In para 17 this witness has denied the defence suggestion that he was having dispute with his father regarding land and on the date of incident, he had a quarrel with his father and assaulted him by axe on his back portion when his father was running back. The defence failed to cause any dent to the statement of this witness regarding specific overt act of the appellant causing axe blow on the back portion of his father. P.W. 1 Kalu in para 4 of his deposition stated that after the incident,

he reached in the village and disclosed about the incident to P.W. 2 Chhogalal, P.W. 3 Gabru and P.W. 4 Ramlal. P.W. 2 Chhogalal and P.W. 4 Ramlal have supported the statement of P.W. 1 Kalu (P.W. 1) about disclosure to them causing injury by the appellant by means of axe.

11. P.W. 13 Dr. Ramesh Kumar Yadav proved in Court the postmortem report of the deceased vide Ex. P/3. He found one incised wound of size 3" x 1" oblique anteriorly upward directed at the level of T-12 and L-1, over back of chest, at spinal cord. Vertebrae column completely separated at T-12 level and L-1 level directed from left to right. The right 12th rib was cut 1" distance from rib bone parallel to bone. Pleura was cut at corresponding level, all blood vessels and muscles were cut at some level when this portion was opened. Pleural cavity was full of blood. There was laceration over right lung 1" x ?" and lung collapsed (right) lower lobe posteriorly.

12. The second injury found by the Autopsy Surgeon was the abrasion 3" x 1" on right forearm. In the opinion of Dr. Yadav, the deceased died because of excessive bleeding from the injuries. Time of death was between 18 to 24 hours from the date and time of post-mortem, examination i.e. 22-7-1996 at 9.45 a.m. He also examined the axe on 3-6-1996 sent by the police with query letter and opined that the injuries sustained by the deceased could be caused by the said axe. He proved his opinion Ex. P/4 on which he also made a diagram of the axe.

13. P.W. 11 Tarachand has deposed that the appellant Motiram in his presence gave information to the police regarding keeping of axe at upper portion of house. He admitted his signature on the memorandum statement Ex. P/13, and in pursuance thereof axe was seized from the appellant Motiram vide seizure memo Ex. P/18. In cross-examination, nothing substantial could be brought out to discard the testimony of this witness regarding recovery of axe at the instance of the appellant. The Investigating Officer P.W. 13 Chandrakant Bhamrey also proved the memorandum statement Ex. P/ 13 of the appellant Motiram and seizure of axe in pursuance thereof vide seizure memo Ex. P/18. The axe was sent to the Forensic Science Laboratory, Sagar. The learned Trial Court has held in para 30 of the impugned judgment that the recovery of axe from possession of the appellant corroborates the version of injured eye-witness P.W. 1 Kalu regarding use of axe by the appellant.

14. In the accused statement recorded u/s 313 of the Code of Criminal Procedure question No. 3 was put to this appellant with regard to possession of axe by him. He denied the same. The appellant in his statement, u/s 313, Cr. P.C. has either denied the question or expressed his ignorance as "Nahin Malum".

15. In view of this factual scenario, it is crystal clear that right from the time of lodging of the First Information Report, filing of charge-sheet u/s 173 of the Code of Criminal Procedure and the evidence adduced by the prosecution, specific prosecution case against the appellant was that he was in possession of axe and caused injury on back portion of the deceased. Therefore, in our considered view,

no prejudice has been caused to the appellant by non-framing of the independent charge u/s 302 of the Indian Penal Code. (See Kammari Brahmaiah and Others Vs. Public Prosecutor, High Court of A.P.,), Radha Mohan Singh @ Lal Saheb and Others Vs. State of U.P., and Dalbir Singh Vs. State of U.P., .

16. The second limb of arguments of the learned Counsel for the appellant is that at the most offence u/s 326 of the Indian Penal Code would be made out against the appellant. On careful perusal of the eye witness's account and medical evidence as discussed hereinabove though the blow was dealt on back portion of the deceased, but its severity can be understood on the basis of the damage caused to the vertebrae column dividing in to two parts, cut of rib bone, pleura, lung, muscles and large blood vessels, the injuries must had caused instantaneous death of the deceased on the spot as stated by P.W. 1 Kalu. We do not find any force in the arguments advanced by the learned Counsel for the question of offence.

17. Ex-consequenti, in the wake of the aforesaid legal and factual discussion, we do not find any merit in this appeal.

18. Therefore, the same is hereby dismissed. The appellant is on bail. He is directed to surrender to his bail bonds before the trial Court on 19-6-07 for being remanded to the jail for serving out the remainder part of his sentence. On failure to surrender as directed, the trial Court is directed to initiate appropriate legal action against the appellant and his surety under intimation to this Court. Office is directed to send a copy of this judgment together with the record of the trial Court to the Court for immediate compliance.