
(1991) 08 AP CK 0011
In the Andhra Pradesh High Court
Case No : C.A. No. 850/90

Nagireddi Siva and Another	Vs	APPELLANT
The State of Andhra Pradesh		RESPONDENT

Date of Decision : 09-08-1991

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 302

Citation : (1991) 2 APLJ 427 : (1992) CriLJ 1339

Hon'ble Judges : Iyyapu Panduranga Rao, J; Bhaskara Rao, J

Bench : Division Bench

Advocate : C. Padmanabha Reddy, for the Appellant; Public Prosecutor, for the Respondent

Judgement

Bhaskar Rao, J.—A-1 and A-2 are the appellants. They challenge their convictions under sections 302 and 201 of the Indian Penal Code and sentences to suffer imprisonment for life and R.I., for two years respectively imposed thereunder.

2. The gravamen of the charge against the accused is that on 27-10-'89 at about 11-00 p.m., at Kondakarla village they caused the death of one Nagireddi Venkata Eswara Prakash (hereinafter referred to as "the deceased") by throttling him with a rope and also used the evidence regarding his death to disappear besides giving wrong information that the deceased died of excessive drinking of alcohol for screening the offence of murder.

3. In this appeal admittedly there is no direct evidence as regards the offence u/s 302, IPC. The trial Court convicted the accused on the basis of the circumstantial evidence. According to the learned counsel, Sri Padmanabha Reddy the circumstantial evidence is not conclusive to hold the accused liable for the offences they were convicted of. He submitted that the extra-judicial confession alleged to have been made by A-2 to P.W.-1, a rickshaw puller, cannot be taken into consideration since the same was resiled and as there was also no other evidence corroborating the alleged confession. Therefore, the learned counsel contended that the accused are entitled to acquittal. The learned Public

Prosecutor, on the other hand, submitted that the accused are rightly convicted on the basis of the evidence available and there are no merits in the appeal for interference.

4. P.W. 1 is the rickshaw-puller to whom A-2 is alleged to have made confession that herself and A-1 murdered the deceased and that P.W.-1 had to take the dead-body in his rickshaw to throw it off somewhere. It is in the evidence of PW 1 that A-1 is the kept mistress of the deceased while A-2 is the sister of A-1. They were all living in a house located in the mango garden of the deceased. On the date of the incident at about 6-00 or 6-30 p.m., while P.W. 1 was at the Atchuthapuram shandy along with his rickshaw, P.W. 2, the farm-servant of the deceased, came to P.W. 1 and asked him to get his rickshaw to the house in the mango garden as required by A-1 and A-2. By the time P.W. 1 went to the house of the deceased, A-1 was viewing the T.V. and A-2 was taking here meals. After some talk, P.W. 1 was given food by A-2 and he also had arrack. P.W. 1 was also asked to sleep at the Ghorī in front of the house. In the mid-night P.W. 1 saw A-2 coming to the well and cleaning her hands and going back into the house. After about half-an-hour thereafter, A-2 came to P.W. 1, woke him up and told him that herself and A-1 murdered the deceased and that P.W. 1 was to take the dead-body in his rickshaw for being thrown out somewhere. P.W. 1, however, did not agree for the same. Thereupon, A-2 requested P.W. 1 to take her to her parents house in Ramannapalem. P.W. 1 took her there and also brought her back. A-2 paid P.W. 1 Rs. 50/-. It is also in the evidence of P.W. 1 that thereafter he went to his house and three days later police examined him. In the cross-examination P.W. 1 deposed that on the following Monday, i.e. three days after the incident, the incident being on Friday, P.W. 1 was taken to the police station. P.W. 1 could not give the distance between Atchutapuram junction and Ramannapalem. He also stated in the cross-examination that for about 2 weeks he was kept in the police-station and that on Monday his statement was recorded by the police. It is elicited from him that killing a man is an offence. In spite of that he did not go inside the house and find out whether the deceased died. Further, it is in the evidence of P.W. 1 that he was not getting sleep on the night in question, that he found A-2 coming out to the well, washing her hands and going back into the house. Within half-an-four thereafter, according to P.W. 1. A-2 woke him up and made the extra-judicial confession referred to. When he was not getting the sleep and was woke up, question of waking him up by A-2 does not arise. All these factors specifically pointed out by the learned counsel give rise to the view that the evidence of P.W. 1 does not merit reliance to base conviction of the accused.

5. P.W. 2 is the farm-servant of the deceased. According to him in the evening hours on the date of the incident, A-2 sent him to bring the rickshaw of P.W. 1. It is admitted by P.W. 2 that he did not know P.W. 1 either personally or by name. While he was proceeding to fetch the rickshaw, he met P.W. 1 and on inquiry he found P.W. 1 to be the person of whose rickshaw A-2 asked him to get. The very meeting of P.Ws. 1 and 2 on the date of the incident appears to be strange and

unnatural. P.W. 2 was residing in the house of the deceased. The police visited the house immediately on the next day. The police could have examined P.W. 2 and P.W. 2 would have disclosed the involvement of P.W. 1. But curiously enough, police appear to have not examined P.W. 2 inasmuch as according to P.W. 1 he was examined only after three days by the police. In this background of the evidence of P.Ws. 1 and 2 it is not safe to rely upon the alleged extra-judicial confession made to P.W. 1 by A-2. Except the extra-judicial confession there is no other evidence on record to incriminate A-1 and A-2 with the offence u/s 302, I.P.C. P.Ws. 3 to 5 are witnesses that went to the house of the deceased after the incident, to whom A-1 and A-2 alleged to have told that the deceased died of excessive alcohol drinking. In pursuance of this P.W. 4 went to the police-station and gave the report, Ex. P-1, that formed basis for the crime. After receipt of Ex. P-1, inquest was held over the dead-body and later the Doctor P.W. 8 conducted the autopsy over the dead-body. P.Ws. 6 & 7 are the mediators, P.W. 9 is the S.I., of Police, P.W. 10 is the Head-Constable and P.W. 11 is the Circle Inspector. The rope, M.O. 4, was recovered by the police in pursuance of the alleged confession made by the accused.

6. In arriving at the guilt of the accused, the Court below relied upon the following circumstances :

- i) A-1 and A-2 were admittedly in the company of the deceased on the intervening night in question,
- ii) A-1 has stated immediately after the death of the deceased to P.Ws. 3 to 5 that the deceased (died) of excessive drinking of arrack,
- iii) A-1 could not reply to P.W. 1, when he questioned as to how the ligature mark appeared on the neck of the deceased,
- iv) A-2's running away and boarding a bus and bringing her back and at that time she disclosed that the death was by hanging, after longtime, i.e. at the time of giving both etc., to the dead-body and finding of a ligature mark over the neck of the deceased by the villagers,
- v) It is not a death by hanging. There are no circumstances to show that it is a suicidal death committed by the deceased himself, because there are no symptoms of such appearance when P.W. 3 first came and saw the dead-body.
- vi) There is no immediate plausible explanation by the accused as to how the deceased died in the circumstances of the case, and
- vii) A-2 asking P.W. 1 to take the dead-body in his rickshaw so that they may throw out the same somewhere to screen the evidence of murder.

7. In our view, once the extra-judicial confession alleged to have been made to P.W. 1 is not believable, the circumstances narrated above are wholly insufficient to hold that the accused alone are responsible for the death of the deceased. It is only "suspicion" that survives, when once the alleged extra-judicial confession is

eschewed from evidence. It is a fact that A-1 was residing with the deceased and A-2 was staying with A-1, being her sister. It is, no doubt, elicited from P.W. 3 that A-1 told him that the deceased died of excessive drinking of arrack. By these circumstances itself it cannot be said that A-1 and A-2 alone had caused the death of the deceased. There is possibility for either of them to cause the death and equally so for a third person. According to the Doctor, P.W. 8, the rope recovered viz. M.O. 4, cannot cause the ligature mark found on the neck of the dead-body. The circumstances relied upon by the Court below may give rise to a suspicion that the appellants-accused are liable for the offence, but by themselves it is not possible to conclude that the accused-appellants are liable for the offence. The dead-body was found in the house of the deceased and P.Ws. 1 and 2 are not eye-witnesses. P.W. 1 was in the house of the deceased during the night in question and he was awoken when A-2 came out, washed her hands and went inside. However, P.W. 1 did not hear any sound from inside the house. If really, P.W. 1 was present while the offence was being committed he would have at least heard some sound, some voice or some cries from the deceased on account of the suspected act of the accused. But P.W. 1 has not stated anything in this regard during his evidence. Further, his evidence shows that P.W. 1 was in the police-custody for two weeks and his statement was recorded during that period. Running away and boarding a bus by A-2 may be out of fear that she may be unnecessarily involved in the offence. It is equally true that according to the Doctor, P.W. 8, the death of the deceased was not the result of suicide but of homicide. However, even if it is homicide, it cannot be held that the accused alone committed the offence.

8. The contention of the learned Public Prosecutor is that the accused were admittedly in the house and therefore the cause of death of the deceased is within their especial knowledge and therefore according to Section 106 of the Evidence Act, the burden lies on them to explain the cause of death. The explanation given by them to P.Ws. 3 to 5 that the deceased died of excessive drinking of arrack proved to be false and therefore from this it can be inferred that the accused alone are liable for the offence. Sri Padmanabha Reddy, the learned counsel for the appellants-accused contended that the burden mainly lies on the prosecution to prove that the offence has been committed by the accused and when that is not proved, the burden cannot be held to have shifted on to the accused by invoking section 106 of the Evidence Act.

9. In view of these rival contentions, the questions that arise for decision in this case are : (i) whether there is burden cast on the accused to prove their innocence particularly when they have given false information as regards the cause of death and (ii) whether the said false information can be taken as the basis for drawing the inference that the accused alone had committed the offence.

10. Adverting to the question of burden of proof section 101 of the Evidence Act lays down that the burden to prove the fact, which a person asserts to have been

in existence in order to have a pronouncement of the Court as regards the legal right or liability, lies on the person so asserting. Section 103 lays down that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence. Section 106 says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The accusation of the prosecution in the instant case is that the accused had caused the death of the deceased. The burden, therefore, lies on the prosecution to prove that the offence is committed by the accused alone beyond reasonable doubt. When the prosecution fails to discharge this burden, merely because the accused had given false information to P.Ws. 3 to 5 as regards the cause of death, they cannot be convicted of the offence u/s 302, I.P.C., by drawing an inference that they alone are liable for the offence. Their giving of false information or failing to prove their innocence is no ground to base conviction and on the contrary it offends the very basis principle of criminal jurisprudence which lays the burden on the prosecution to prove the offence against the accused. In the instant case, the prosecution solely relied on the circumstantial evidence since there is no direct evidence to prove the offence. It is held by the Supreme Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, that the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be established :

"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must or should" and not "may be" established,

(2) the facts so established should be consistent with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence to complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

In the instant case as noted supra the entire circumstances put together cannot be held to give rise to the conclusion that the accused alone committed the offence and negative wholly the innocence of the accused. The extra-judicial confession alleged to have been made to P.W. 1 cannot be held proved.

11. It is a fact as submitted by the learned public prosecutor both the accused were residing in the same house in which the deceased died. The accused also told P.Ws. 3 to 5 that the deceased died of excessive drinking of arrack. In these circumstances, the learned Public Prosecutor contends that the burden lies on the accused to explain the cause of death and in-as-much as the explanation

offered was false, the Court below is right in drawing the inference that the accused alone are responsible for the death. Contending but non-explanation does not render the accused to be liable for the offence the learned counsel for the appellants took us through on English decision in *Seneviratne V.R* 1936 (3) All ER 36. Dealing with Section 106 of the Evidence Act, Lord Roche observed at page 50 :

"It is quite right to say that the learned Judge in the present case in the course of his very able charge to the jury explained generally that the onus was on the Crown to establish guilt. But the passage in the charge under examination seems nevertheless to be open to very serious objection. It is not primarily or at all a general comment, which would be and was quite admissible, on the fact that the appellant was not called to give evidence. Nor was it a direction that any specific named fact was one which fell within the section with the result that the onus of proving that fact was upon the appellant. It was a direction as to facts generally, and therefore it was particularly unfortunate that the relevant passage in the charge should have been expressed thus :

"He has to explain In the absence of explanation, the only inference is that he is guilty."

Its tendency would be to lead the jury to suppose that if anything was unexplained which they thought that the appellant could explain, they not only might but must find him guilty"

Accordingly, as per this decision it is clear that from the mere absence of explanation, it cannot be inferred that the accused alone are guilty.

In *Attygalle v. The King* AIR 1936 P.C. 169 : (37 Cri LJ 628) the prosecution was against A-1 for performing an illegal operation and against A-2 for abetting A-1 in that crime. At the trial the learned Judge gave a direction to the Jury thus at page 628 (of Cri LJ) :

"There is a section which is really the basis of circumstantial evidence so far as it occurs in Ceylon; that section says when any fact is especially within the knowledge of any person the burden of providing that fact is upon him. Miss Maye --- that is the person upon whom the operation was alleged to have been performed -----" was unconscious and what took place in that room that there- quarters of an hour that she was under chloroform is a fact specially within the knowledge of these two accused who were there. The burden of proving that fact, the law says, is upon him namely that no criminal operation took place but what took place was this and this speculum examination"

Their Lordships of the Privy Council were of opinion that that direction does not correctly state the law and that it is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. Their Lordships also opined that the direction had the effect of giving an understanding to the Jury that the burden was on the accused. While pointing out the objection

to which the direction extracted was open, the Board of the Privy Council ofcourse did not interfere with the conviction owing to availability of clear evidence of guilt free from all connection with the irregularity pointed out.

12. In Shambu Nath Mehra Vs. The State of Ajmer, the prosecution was for the alleged offence that the accused therein obtained certain sums from the Government as T.A., without travel. The booking clerk examined as a witness by the prosecution through his evidence proved that no second class tickets were issued on the relevant dates. At the same time he deposed that the passengers could pay the fares on the trains and could also by paying the difference travel in 2nd class having purchased a ticket for a lower class. There was no proof that the accused had resorted to either of the above two courses although prosecution had the registers and books and could have proved it. Instead of doing that, the prosecution tempted to invoke Section 106 of the Evidence Act to lay burden on the to prove that he had recourse to either of the abovestated measures. In those circumstances after referring to the earlier two decisions, viz., Attygalle v. Emperor AIR 1936 PC 169 : (37 Cri LJ 628) and Seneviratne v. R. 1936 (3) All ER 36 the Supreme Court held that the relevant and material information was as much within the especial knowledge of the prosecution as in that of the accused and therefore the prosecution could not rely upon Section 106 of the Evidence Act.

13. In Sawal Das Vs. State of Bihar, the Supreme Court dealing with the scope of sections 103 and 106 of the Evidence act held in paragraph 10 :

"Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general of primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima fascie case, that the question arises of considering facts of which the burden of proof may lie upon the accused."

The important question in view of the above decision that arises in that present case is, whether the prosecution had discharged its initial or general and primary burden of proving the guilt of the appellants beyond reasonable doubt. It is not, as already held by us above. It is only when the evidence led by the prosecution, if believed, will sustain a conviction or atleast makes out a prima facie case, that the question of accused discharging the burden u/s 106 of the Evidence Act arises. Therefore, there should be at least a prima facie case made out by the evidence let-in by the prosecution to take the false information given by the accused in-aid to lend assurance to the prosecution story. Thus, the false information given by the accused would have the effect of being simply taken-in aid to lend assurance to the prosecution story, and can never form basis for drawal of inference that the accused and accused alone are guilty of the offence. To the same effect is the decision of the Supreme Court in Sharad Birdhichand Sarda Vs. State of Maharashtra, .

14. The foregoing discussion of the case law ultimately leads to the conclusion that the accused are not guilty of the offence under Sec. 302, IPC, and accordingly the conviction and sentence imposed thereunder have to be set aside.

15. It is next contended by the learned counsel for the appellants that the conviction of the appellants u/s 201 of the Indian Penal Code is not sustainable inasmuch as the accused have not caused disappearance of any evidence in regard to the offence u/s 302 of the Indian Penal Code. The learned counsel submitted that according to the evidence of P.Ws. 3 to 5 the accused had told them that the deceased died of excessive drinking of arrack, and after the dead-body was given a bath when it was found that there was a ligature mark on the neck and when questioned, A-2 told P.W. 5 that the deceased died of hanging. Except this false information given by the accused, there is no evidence to show that the accused had caused disappearance of evidence of the commission of offence u/s 302, IPC., and accordingly, the learned counsel contended, the accused could at best be said to have committed an offence punishable u/s 203 IPC., and not at all u/s 201 IPC.

16. It is, at the outset, necessary to have a look at Sections 201 and 203 I.P.C., which read :

Section 201 IPC, reads :

"201. Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,"

17. Therefore, to bring home a charge u/s 201 IPC, the prosecution must prove -

- i) that an offence has been committed,
- ii) that the accused knew or had reason to believe the commission of such an offence,
- iii) that with such knowledge or belief he
 - (a) caused any evidence of the commission of that offence to disappear, or
 - (b) gave any information relating to that offence which he then knew or believed to be false,
- iv) that he did so as aforesaid with the intention of screening the offender from legal punishment.

No doubt, causing disappearance of evidence or giving false information would satisfy the requirement adumbrated by ingredient No. (iii). But, at the same time, it cannot be said that ingredient No. (iv) is satisfied in the instant case inasmuch as the accused-appellants alone are tried for the offence u/s 302 IPC and that could not be established against the accused by the prosecution, and

there is none else prosecuted for purposes of screening him/her from legal punishment by giving the false information. If there is an offender found guilty of the offence viz. u/s 302 IPC in the instant case, it is possible to hold that the accused had with the intention to screen him from legal punishment gave false information. When it is not the primary and sole object of the accused to screen the offender from legal punishment, from the mere fact that they gave false information to P.Ws. 3 to 5 regarding the death of the deceased, it cannot be held that the accused are liable for punishment u/s 201 IPC. However, u/s 203, which reads :

"203. Whoever, knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or believes to be false, shall be punished with".

There is no need to intend screening the offender from legal punishment. The main ingredients necessary to be satisfied to constitute an offence u/s 203 of the Indian Penal Code are :

1. that an offence has been committed.
2. that the accused knew or had reason to believe that such an offence had been committed,
3. that he gave the information with respect to that offence.
4. that the information so given was false;
5. that when he gave such information he knew or believed it to be false.

In this case the accused having known that the deceased died resultant of an offence gave false information which they new at that point of time to be false, and therefore are guilty u/s 203 IPC. We accordingly hold the accused - applicants guilty u/s 203 IPC instead of u/s 201 IPC.

18. In the result, the conviction and sentence of both the accused-appellants u/s 302 IPC are set aside and they are acquitted of the said offence. However, their conviction u/s 201 IPC is modified into one u/s 203 IPC and are sentenced to suffer rigorous imprisonment each for two years. The criminal appeal is accordingly allowed in part.

19. Appeal partly allowed.