

(2013) 12 KAR CK 0344

In the Karnataka High Court

Case No : Criminal R.P. No's. 811, 817 of 2004 and Criminal P. 2306 of 2004

Sri Ravindra Reshme, Sri Gangadhar Kushtagi and Sri Teekay
@ T.K. (T.K. Thyagaraj) APPELLANT

Vs

Sri B.A. Harish Gowda
 Sri B.A. Harish Gowda Vs RESPONDENT
Ravindra Rashme

Date of Decision : 18-12-2013

Acts Referred:

Citation : (2014) 1 AKR 789 : (2014) 1 KCCR 621

Hon'ble Judges : H.N. Nagamohan Das, J

Bench : Single Bench

Advocate : C.H. Hanumanthraya, for P1 and P3 Sri. Gururaj Joshi, for P2 in Criminal R.P. Nos. 811, 817/2004 and Sri. Udaya Holla, for Sri C.H. Kempe Gowda, in Criminal P. 2306/2004, for the Appellant; Udaya Holla, for Sri C.H. Kempe Gowda in Crl. R.P. Nos. 811, 817/2004 and Sri. C.H. Hanumantharaju in Crl. P. 2306/2004, for the Respondent

Judgement

H.N. Nagamohan Das, J.—These petitions are directed against the judgment dated 12.04.2001 in C.C. No. 5295/1998 passed by the II Additional Chief Metropolitan Magistrate, Bangalore city and the common judgment dated 19.04.2004 in Crl. Appeal No. 289/2001 and Crl. R.P. No. 210/2001 passed by the Fast Track Court (Sessions) Judge IV, Bangalore city. Petitioners in Crl. R.P. Nos. 817/2004 and 811/2004 are the accused and the petitioner in Crl. P. No. 2306/2004 is the complainant before the trial Court in C.C. No. 5295/1998. In this order, for convenience, the parties are referred to their status before the trial Court in C.C. No. 5295/1998.

2. Complainant filed a complaint against 4 accused alleging that accused No. 1 is the printer, publisher and editor of a weekly Kannada journal called "LANKESH PATRIKE". Accused Nos. 2 to 4 are reporters writing articles in the said journal. In this weekly journal LANKESH PATRIKE, in its editions dated 05.08.1998, 19.08.1998 and 26.08.1998, marked as Ex. P. 2, Ex. P. 3 and Ex. P. 4 respectively, published articles on the complainant. According to the complainant

the imputations made in these articles are malicious, false, cooked up and had caused damage to the reputation of the complainant. It is further contended that the allegations made in these articles are defamatory in nature, lowered the image of the complainant, harmed his character and reputation in the eye of public and as such the accused have committed an offence punishable u/s 500 IPC.

3. The accused entered appearance before the trial Court and contested the proceedings. Before recording the plea, accused No. 1 died and consequently proceedings came to be abated against him. Accused Nos. 2 to 4 pleaded not guilty. The complainant examined 8 witnesses as P.W. 1 to P.W. 8 and got marked Ex. P. 1 to Ex. P. 39. The accused examined 7 witnesses as D.W. 1 to D.W. 6 and got marked Ex. D. 1 to Ex. D. 8.

4. The trial Court on appreciation of the pleadings, oral and documentary evidence passed the impugned judgment on 12.04.2001 convicting accused Nos. 2 to 4 for the offences punishable u/s 500 IPC. Further accused Nos. 2 and 4 are sentenced to pay fine of Rs. 5,000/- each and in default, to undergo simple imprisonment for a term of two months. Accused No. 3 is sentenced to undergo simple imprisonment for a period of three months and also pay fine of Rs. 1,000/- in default to undergo simple imprisonment for a further period of one month. Aggrieved by this judgment of conviction and sentence, accused Nos. 2 to 4 filed Crl. A. No. 289/2001. The complainant, being aggrieved by the inadequacy of sentence levied by the trial Court filed Crl. R.P. No. 210/2001 before the Fast Track Court, Bangalore. The lower Court after hearing arguments framed the following points for its consideration.

i. Whether the articles in question namely, Ex. P. 3(a) authored by the 1st appellant, Ex. P. 3(c) & Ex. P. 4(b) authored by the 2nd appellant & Ex. P. 4(a) authored by the 3rd appellant were published by them with an intention to harm the reputation of the complainant?

ii. Whether the appellants have committed the offence of defamation for having indulged in publication of malicious and defamatory imputations and insinuations in the articles published at Ex. P. 3(a), Ex. P. 3(c)/P. 4(b) and Ex. P. 4(a)?

iii. If so, whether the sentence imposed against the appellants 1 to 3 is inadequate and not commensurate with the Offence proved against them?

iv. For what order?

5. On re-appreciation of the entire material on record the lower appellate Court passed the impugned common judgment dated 19.04.2004 dismissing the appeal filed by the accused and allowing the criminal revision petition filed by the complainant and enhanced the sentence directing accused Nos. 2 and 4 to pay fine of Rs. 25,000/- each and in default to undergo simple imprisonment for a term of six months. Accused No. 3 is sentenced to undergo simple imprisonment for a term of one year and to pay fine of Rs. 10,000/- and in default to pay fine

amount, to undergo simple imprisonment for further term of six months. Further to pay a sum of Rs. 50,000/- to the complainant as compensation from and out of the fine amount realised from the accused. Aggrieved by the judgment of the trial Court and the lower appellate Court the accused are before this Court in Crl. R.P. Nos. 811/2004 and 817/2004. The complainant is before this Court in Crl. P. No. 2306/2004 seeking enhancement of sentence.

6. Sri. C.H. Hanumantharaya and Sri. Gururaj Joshi, learned advocates for the accused contend that the trial Court committed an illegality in recording a joint plea of all the accused contrary to Section 251 Cr.P.C. It is further contended that where there are more than one accused, the plea of each accused should be separately recorded. Even in the plea recorded by the trial Court particulars relating to offence committed by the accused is not specified. Therefore the plea recorded by the trial Court is an inherent defect which goes to the root of the matter and on this ground the impugned judgments of conviction and sentence are liable to be set aside. Secondly it is contended that the trial Court prepared common questionnaire of 52 questions for the purpose of recording the statement of accused u/s 313 Cr.P.C. It is contended that most of the questions asked to the accused are irrelevant, unfair, unnecessary, ambiguous and illegal. This approach of the trial Court is contrary to law and judgments rendered by this Court and the Apex Court. The accused have no antecedents. The accused have no personal enmity against the complainant. In the larger interest of public the accused have written the articles. The courts below without considering this aspect of the matter passed the impugned order of sentence and the same calls for interference. Reliance is placed on number of decisions.

7. Per contra Sri. Udaya Holla, learned Senior Counsel for the complainant contends that on the ground of technical defects in the matter of recording plea and Section 313 statements, conviction and sentence cannot be set aside. The alleged defects in the matter of recording plea was not raised before the trial Court at the earliest point of time. The accused by accepting the legality of the plea recorded by the trial Court cross-examined the prosecution witnesses, led defense evidence and contested the proceedings. At this stage it is not open for the accused to contend that there was defect in the matter of recording plea and on that ground to set aside the judgment of conviction and sentence. It is contended that though the trial Court framed common questions to all the accused for the purpose of recording Section 313 statement, only relevant questions are asked to each of the accused and not all the 52 questions. Further the accused have not shown as to what is the prejudice that is caused to them in recording Section 313 statement. It is further contended that both the Courts have concurrently held that the charges leveled against the accused as proved. The accused are highly educated, without verification, without taking minimum care and caution wrote and published defamatory articles with an intention to malign, defame and harm the reputation and character of the complainant. On account of the defamatory articles the complainant suffered mental trauma, anguish, pain and suffering. Therefore deterrent punishment of sentence is to be

levied on the accused. The trial Court and the lower appellate Court though sentenced the accused the same is grossly inadequate. Therefore he contends that the sentence of imprisonment and also the fine amount is to be enhanced reasonably. Reliance is placed on number of decisions.

8. Learned advocate for accused have not addressed arguments on the merits of the case. On the basis of pleadings and arguments the following questions will arise for my consideration.

i. Whether the impugned judgments of conviction and sentence passed by the Courts below are liable to be set aside on the ground that there are defects in the matter of recording the plea and Section 313 statement of the accused?

ii. Whether the sentence levied by the Courts below is just and proper in the facts and circumstances of the case?

On point No. 1

9. On 15.03.1999 the trial Court recorded the plea of accused and the same reads as under:

It is alleged that you A1 being Editor, Printer and Publisher and you A2 to A4 being Sr. Reporter and members of Lankesh Patrike, a weekly magazine dt. 5th, 19th and 26th Aug. 1998 written and published imputations, which, harms reputation of C.W. 1 Harish Gouda in the society, said imputations lowered his moral and intellectual character in the society thus committed offence punishable U/s 500 of IPC.

Q1. Do you plead guilty or claims to be tried?

Certified that the accusation of the accused is readover and explained to the accused in the language known to him who has admitted the correctness of the same.

Sd/- 15/3/ II Addl. C.M., B"lore City

10. It is not in dispute that accused No. 1 died on 25.01.2000. On the date of recording the above plea, accused No. 1 was not alive. The trial Court without taking note of the death of accused No. 1 recorded the above plea as if he is alive. The particulars of the offence as required u/s 251 Cr.P.C. are not mentioned in the plea recorded by the trial Court. Further it is seen that the trial Court recorded the joint plea of all the three accused and this is yet another irregularity committed by the trial Court. It is settled position of law that when there are more than one accused, the plea of each accused should be separately recorded "as nearly as possible". Learned counsel for the accused relying on a judgment of this Court in the case of Akil Pasha Vs. State of Mysore, 1967 (2) Mys. L.J. 28 contend that the matter is to be remanded.

11. In the instant case, after recording the plea by the trial Court, complainant examined 8 witnesses, accused cross-examined the prosecution witnesses and

adduced defense evidence by examining 7 witnesses. At the earliest point of time, the accused have not questioned the defect in recording the joint, plea. On the other hand the accused by understanding the case of the complainant contested the proceedings and the same ended in conviction. Even in the appeal filed by the accused they have not urged the ground of defect in plea. For the first time before this court learned advocate for accused contend that there is a defect in recording the plea. Further it is not shown to me as to what is the prejudice that is caused to the accused in recording the defective plea by the trial Court.

12. It is contended that the trial Court framed 52 common questions to all the three accused while recording Section 313 Cr.P.C. statement. It is no doubt true that the trial Court framed 52 common questions in respect of all the three accused, but all the 52 common questions are not asked to all the three accused. A perusal of the statement of all the three accused specifies that certain questions are not asked to each of the accused. Some of the question are common and they are put to all the accused. Though there is irregularity in framing common questions to all the three accused only relevant questions were put to them. But this defect in framing common questions by the trial Court has not resulted in any prejudice to the accused. It is not shown to me as to what is the prejudice that is caused to each of the accused. In the absence of any prejudice caused to the accused the impugned judgments cannot be set-aside merely because that there are certain technical defects. The Supreme Court in *Moseb Kaka Chowdhry vs. State of West Bengal*, 1956 SC 536 held as under:

A judgment is not to be set aside merely by reason of inadequate compliance with S. 342, Criminal P.C. clear prejudice must be shown. Where accused is represented by counsel at the trial and in appeal, it is up to the accused or his counsel in such cases to satisfy the Court that such inadequate examination has resulted in miscarriage of justice. If the counsel is unable to say that his client had in fact been prejudiced and if all that he could urge is that there was a possibility of prejudice, that is not enough.

In *Labhchand Dhanpat Singh Jain Vs. The State of Maharashtra*, it is held as under.

It is clear to us that the appellant was fully aware of the nature of the allegations made against him. He had not merely given a detailed explanation u/s 108 of the Act, of the circumstances in which he said he was arrested with the gold bars, but, he had also filed an elaborate written statement. He had indicated that this is the only form in which he would give his explanation. It is true that the general form of questions put does not strictly comply with the provisions of Section 342 Criminal Procedure Code. But, we are unable to hold that the appellant suffered any injustice for this reason. Indeed, he had not even raised such a question in the Trial Court or before the High Court. If he had done so, the alleged defect could have been easily cured. The objection seems to us to be most technical and flimsy. The defect could not have possibly vitiated the conviction of the

appellant.

In *Paramjeet Singh @ Pamma Vs. State of Uttarakhand*, it is held as under:

If any appellate Court or revisional court comes across the fact that the trial Court had not put any question to an accused, even if it is of a vital nature, such an omission alone should not result in the setting aside of the conviction and sentence as an inevitable consequence. An inadequate examination cannot be presumed to have caused prejudice. Every error or omission in compliance of the provisions of Section 313 Cr.P.C., does not necessarily vitiate trial. Such errors fall within category of curable irregularities and the question as to whether the trial is vitiated, in each case depends upon the degree of error and upon whether prejudice has been or is likely to have been caused to accused. Efforts should be made to undo or correct the lapse. (Vide: *Wasim Khan Vs. The State of Uttar Pradesh*, ; *Bhoor Singh and Another Vs. State of Punjab*, ; *Labhchand Dhanpat Singh Jain Vs. The State of Maharashtra*, ; *State of Punjab Vs. Naib Din*, ; and *Parsuram Pandey and Others Vs. The State of Bihar*,)

Thus, it is evident from the above that the provisions of Section 313 Cr.P.C. make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court.

13. In the above judgment the Supreme Court considered all the judgments relied on by the learned counsel for the accused relating to Section 313 Cr.P.C. The Supreme Court by considering the entire case law relating to Section 313 Cr.P.C. from 1952 to 2010 held that inadequate examination u/s 313 Cr.P.C. cannot be presumed to have caused prejudice. It is further held every error or omission in compliance with the provisions of Section 313 Cr.P.C. does not vitiate the trial.

14. Though there are certain procedural irregularities in the matter of recording plea and the statement of accused u/s 313 Cr.P.C. the same cannot be a ground to set-aside the impugned judgments. The proceedings were initiated in the year 1998 and we are in 2013. After lapse of nearly 16 years I am of the considered opinion that at this stage on the ground of certain technical defects the impugned judgments cannot be set-aside and the matter cannot be remanded. These irregularities have not caused any prejudice to the accused. Therefore, point No. 1 is answered in negative.

On point No. 2

15. The trial Court sentenced accused 2 and 4 to pay fine of Rs. 5000/- each and in default to undergo simple imprisonment for a term of two months. Accused No. 3 is sentenced to undergo simple imprisonment for a period of three months and also to pay fine of Rs. 1000/- and in default to undergo simple imprisonment for a period of one month. In appeal the lower appellate Court enhanced the sentence directing accused 2 and 4 to pay fine of Rs. 25,000/- each in default to undergo simple imprisonment for a term of six months. Further Accused No. 3 is sentenced to undergo simple imprisonment for a term of one year and to pay fine of Rs. 1000/- and in default to undergo simple imprisonment for a term of six months.

16. The Supreme Court in *Saradhakar Sahu Vs. State of Orissa*, held as under:

Sentencing the guilty is the last and the most important, albeit a difficult chapter in a trial. Theories of punishment are many: Reformatory, preventive, deterrent, retributive and denunciatory. Retributive and denunciatory theories have lost their potency in the civilized nations. Deterrent and preventive punishment is sometimes necessary in the interest of society. The modern trend places emphasis on the reformation of the offender and his rehabilitation. Reformation and not retribution is the sentencing lodestar.

17. The purpose of imposing a deterrent punishment on an offender is to deter that individual from committing future crime and set lesson for others. There is no one reason why a person commits a crime; so no one type of punishment fits all criminals. It is to be remembered that what is punishment for one person may be of no effect to other. Some offenders are sensitive to pain, others to humiliation and others to confinement and others may require quittance. Therefore, it is the duty of the court to examine the fact situation in each case while sentencing the accused.

18. Ex. P. 2 is the issue of "LANKESH PATHRIKE" dated 05.08.1998. In this issue Ex. P. 2 there are two articles against the complainant. One article refers that it was written by Lankesh. The other article was written by a reporter. No evidence is placed on record to show that which reporter has written the article in Ex. P. 2. In the absence of any evidence it is to be held that the accused have not written the article in Ex. P. 2. Further Ex. P. 3 is another issue dated 19.08.1998 containing three articles marked as Ex. P. 3(a), Ex. P. 3(b) and Ex. P. 3(c). Accused No. 2 admits that he is the author of the article Ex. P. 3(a). Accused No. 2 admits that he is the author of the article Ex. P. 3(c). But the article marked as Ex. P. 3(b) is shown as written by Lankesh. Another issue dated 26.08.1998 is marked as Ex. P. 4 containing two articles marked as Ex. P. 4(a) and Ex. P. 4(b). Accused No. 3 admits that he is the author of article marked as Ex. P. 4(b). So also accused No. 4 admits that he is the author of article marked as Ex. P. 4(a). From this evidence on record it is clear that out of 8 articles in Ex. P. 2, Ex. P. 3 and Ex. P. 4 one was written by accused No. 2, two are written by accused No. 3 and one was written by accused No. 4. The remaining 4 articles are not written by the accused.

19. The accused contend that the captions of each article are not written by them and on the other hand they are coined by the editor. The Courts below without considering this aspect of the matter passed the impugned order of sentence as if all the articles are written by the accused and the captions are coined by them. This approach of the Courts below in sentencing the accused needs for interference by this Court.

20. In the instant case all the three accused are qualified and are writing to the journals for quite a long time. The accused in their long journey have no antecedents. Even after the present incident in the year 1998 they have not committed any similar offence or nay other offence. The incident in question is first against the accused. The accused are not a different breed of human beings or distinctive type of mentality. The accused are first offenders and they should be looked leniently. The awakening of inner being of the accused is more than torturing through exterior compulsions. Having regard to the past history and the present position the accused are capable of real reform. Therefore, I hold point No. 2 in negative and the order of sentence passed by the courts below needs to be interfered. For the reasons stated above, the following;

ORDER

i. Crl. P. No. 2306/2004 is hereby dismissed.

ii. Crl. R.P. Nos. 817/2004 and 811/2004 are partly allowed.

iii. The impugned judgment of in C.C. No. 5295/1998 passed by II Additional Chief Metropolitan Magistrate, Bangalore city and confirmed in Crl. A. No. 289/2001 by the Fast Track Court (Sessions Judge IV), Bangalore City in so far as it relates to convicting the accused is hereby confirmed.

iv. The impugned order of sentence passed in C.C. No. 5295/1998 and modified in Crl. A. No. 289/2001 is hereby reduced as under:

a. Petitioners/accused Nos. 2 and 4 are sentenced to pay fine of Rs. 15,000/- each and in default to undergo simple imprisonment for a period of three months.

b. Petitioner/accused No. 3 is sentenced to pay fine of Rs. 20,000/- and in default to undergo simple imprisonment for a term of four months.

c. Out of the fine amount to be recovered from the accused a sum of Rs. 45,000/- be paid to the complainant as compensation. Ordered accordingly.