

(2011) 03 KAR CK 0008
In the Karnataka High Court
Case No : Criminal Appeal No. 1523 of 2004

State of Karnataka

APPELLANT

Vs

Kallappa Somanna Kamble and Others

RESPONDENT

Date of Decision : 08-03-2011

Acts Referred:

Citation : (2013) 2 KCCR 1156

Hon'ble Judges : Subhash B. Adi, J;N. Ananda, J

Bench : Division Bench

Advocate : V.M. Banakar, Additional State Public Prosecutor, for the Appellant;
Jagadish Patil, for the Respondent

Final Decision : Allowed

Judgement

Subhash B. Adi, J.—This appeal is by the State against the judgment of acquittal in Sessions Case No. 109/1998 dated 16th July 2004 on the file of Additional Sessions Judge, Belgaum. Accused No. 1 - Kallappa Somanna Kamble, accused No. 2 - Sanjeev Kallappa Kamble and accused No. 3 - Babasab @ Baban Kallappa Kamble were tried for an offence punishable under Sections 302, 307, 504 read with Section 34 of the Indian Penal Code.

2. Deceased Shankar is the father of PWs-1, 2, 6 and 8 and husband of PW-7. PWs-1, 2, 6, 7 and the deceased had gone to their land on 18.12.1997 to form a road for the transportation of the sugar cane from their land. At about 9 a.m., accused came to the spot, picked up a quarrel by abusing the deceased as well as his children. Accused No. 1 assaulted the deceased with a knife on his stomach, accused No. 2 assaulted with the stick on his head and accused No. 3 assaulted with stick on the forehead. When PW-6 went to the rescue of her father, accused No. 2 assaulted her with a stick on the left side of her head. Accused No. 1 assaulted PW-1 with knife on his right shoulder, accused No. 3 also assaulted with a stick on his right forearm, accused No. 2 assaulted with a stick on his head and right hand. PWs-1, 2 and 6 and PW-4 - Gyanaba came to the rescue and took the injured Shankar to Athani Government Hospital where

deceased was given initial treatment. PW-6's statement was recorded by the Police with the help of the writer. On the basis of her complaint, PW-5 registered a case in Crime No. 252/1997 against the accused for an offence punishable under Sections 326, 324, 504 read with Section 34 of IPC and despatched the FIR - Ex. P8 to the learned Magistrate, Athani. He visited the Government Hospital, Athani, recorded the statements of Shankar - deceased, PW-1 - Annasaheb, PW-2 - Ravi and others. He visited the scene of occurrence and prepared the spot panchanama - Ex. P3, seized the knife and two sticks M.Os. 1 to 3 under panchanama, arrested accused Nos. 1 to 3 and interrogated them. He also recorded the statement of PW-8 - Sunil and further statement of CW-1 and requested the learned Magistrate for adding the offence punishable u/s 307 of IPC by his letter dated 23.12.1997. On 9.2.1998 he received the case papers from Miraj Police Station having held inquest on the dead body of Shankar, who died on 7.2.1998 for the injuries sustained by him. On the basis of the inquest report, a letter was sent to the learned Magistrate for adding the offence punishable u/s 302 of IPC. Thereafter he handed over the further investigation to CPI Sri. Agadi, who recorded the further statement of PWs-6, 7 and 4 on 11.3.1998, received the wound certificates Exs. P4 and P5 of PW-6 and PW-1. On completion of the investigation, he filed the charge sheet.

3. The trial Court framed the charge against the accused for an offence punishable under Sections 302, 307, 504 read with Section 34 of IPC. The charge as framed by the trial Court reads as under:

CHARGE

I, Shri. S.P. Hanaminahal, M.A., LL.B., Presiding Officer, Fast Track Court & Additional Sessions Judge, Belgaum, hereby charge you

A. 1. Kallappa Somanna Kamble

A. 2. Sanjeev Kallappa Kamble

A. 3. Babasab @ Baban Kallappa Kamble All R/o Bevanur as follows:

That you accused Nos. 1 to 3 on or about 18th December 1997 at about 9 a.m. in furtherance of your common intention in Jivanur village, within Atharu P.S. limits committed the murder of Shankareppa by intentionally or knowingly causing his death by assaulting him with sticks on his head and shoulder and thereby committed an offence punishable u/s 302 read with Section 34 of IPC and within the cognizance of the Court of Sessions.

That you accused Nos. 1 to 3 on the aforesaid date, time and place, within Athani P.S. limits in furtherance of your common intention with such an intention or knowledge, and under such circumstances you accused 1 to 3 caused injuries to complainant, CWs-6, 7 and 8 namely Annasaheb, Ravishankar and Sushila Shankar and that if by that act you had caused the death of complainant and CWs. 6, 7 and 8, you would have been guilty of murder and that you caused hurt to the said persons by the said act and thereby committed an offence punishable

U/s 307 r/w Sec. 34 of IPC and within the cognizance of the Court of Sessions.

And further that you accused Nos. 1 to 3 on the aforesaid date, time and place within Athani P.S. limits, in furtherance of your common intention intentionally insulted the deceased, complainant Shobha and CWs. 6, 7 and 8 namely, Annasaheb, Ravishankar and Sushila Shankar abusing them by using vulgar language intentionally insulted and thereby gave provocation to them intending or knowing it likely that such provocation would cause the said persons to break the public peace and thereby committed an offence punishable u/S 504 R/w Sec. 34 of the IPC and within the cognizance of the Court of Sessions.

Accused pleaded not guilty. Hence, they were tried for the above charge.

4. The prosecution in support of its case examined PWs-1 to 8, marked Exs. P1 to P12 and produced M.Os. 1 to 3.

5. The trial Court on appreciation of the evidence acquitted the accused by observing that, the prosecution has failed to prove that the accused had land adjoining to the land of the deceased. The injured witnesses PWs-1 and 2 have not supported the prosecution case. There was a cart track available on the southern side of the deceased's land. The evidence do not show that the accused had obstructed in forming the cart track. Though PW-1 is injured, according to PWs-6 and 7, PW-2 is the son of the deceased and brother of PWs-1 and 6 and son of PW-7. PWs-1 and 2 have not supported the case put forth by the prosecution. The relationship between PWs-1, 2 and 6 to 8 was cordial. PW-1 has not stated as to who assaulted his deceased father and sister PW-6. PW-8 is not an eye witness to the incident. Motive alleged is not proved and held that there is no evidence enough to hold that the prosecution has proved the guilt of the accused beyond reasonable doubt. Accordingly, acquitted the accused for the offences charged against them.

6. We heard the Additional State Public Prosecutor Sri. Banakar and Sri. Jagadish Patil for the accused.

7. Police on investigation has filed the charge sheet showing as many as 20 witnesses. From amongst the witnesses, CW-12 is Dr. R.M. Sajjan, Medical Officer, Bijapur, CW-13 is Dr. M.C. Koranamath, Medical officer, Athani and CW-14 is Dr. G.S. Modde, Medical Officer, Government Medical College and Hospital, Miraj and CW-18 is the Sub-Inspector of Police, Miraj Police Station. Along with the charge sheet, the Investigating Officer had also produced 10 documents. From amongst 10 documents, document Nos. 6 and 7 are the wound certificate of the deceased; issued by the Hospital at Bijapur; document No. 8 is the wound certificate issued by the Medical Officer, Athani and document No. 9 is the postmortem report of the deceased.

8. During the course of the trial, the prosecution has examined eight witnesses viz., PWs-1 and 2 - Sons of the deceased, PW-3 - Police Constable, who carried the FIR, PW-4 - independent witness one Gyanaba, PW-5 - Police Inspector, who

registered the crime and took up the investigation. PW-6 is the complainant, an injured and the daughter of the deceased. PW-7 is an eye witness to the incident and the wife of the deceased. PW-8 is the son of the deceased.

9. The order sheet of the Fast Track Court reveals that, on 29.6.2004, PWs. 1 and 2 were examined and Exs. P1, P2 and Exs. P3 to P7 were marked. Exs. P3 to P7 were marked with consent. CWs-2 to 5 and 11 to 14 were treated as unnecessary witnesses. CWs-8 and 10 were treated as hostile and memo was filed stating that, CWs-15 and 16 are given up as unnecessary and as against CWs. 1, 9, 17 to 20 warrant was issued and the matter was adjourned to next date i.e., 30th June 2004 itself. On the said date, PWs-3 to 5 were examined. Exs. P1 to P12 were marked and M.Os. 1 to 3 were also marked. CWs-18 and 20 were given up as unnecessary, further stated that CW-1 was absent inspite of the witness warrant and observed that no purpose would be served by examining CW-1, and accordingly rejected the request of the Special Public Prosecutor and case of the prosecution was taken as closed and as there was no defence evidence, posted the matter on 2.7.2004 for recording the statement of the accused u/s 313 of Cr.P.C. On the said date, CWs-8 and 10 appeared before the Court and made an application u/s 311 of Cr.P.C. requesting the Court to examine them and notice was given to the Special Public Prosecutor, who had given up CWs-8 and 10, treating them as hostile. The said application was allowed. CWs 8 and 10 viz., PWs-7 and 8 were examined. CW-1 (PW-6), who was also given up, appeared, her evidence was also recorded. She is the injured complainant. Again the matter was posted for recording of statement u/s 313 of Cr.P.C. and after hearing the argument. The learned Judge by the impugned judgment acquitted the accused.

10. From the order sheet, it reveals that, the prosecution has treated the material witness viz., the injured complainant - PW-6 as hostile even before she was examined. It has given up the Doctor, who initially treated the deceased at Athani. It has also given up the Doctor, who treated at Bijapur and the Doctor, who treated at Miraj. It is in the evidence that the deceased died on 7.2.1998, while he was under treatment. When the Investigating Officer along with the charge sheet has produced a list of witnesses required to be examined to prove the prosecution case and has also produced the material documents, the Prosecutor and the Fast Track Court in a very casual way have given up the material witnesses as unnecessary and have also not sought to get the relevant material documents produced before the Court, such as, wound certificate issued by the Medical Officer, Athani, Medical Officer, Bijapur and Medical Officer, Miraj. When a case is tried for an offence punishable u/s 302 of IPC, the prosecution is required to prove that the deceased died due to the injuries he suffered in an assault by the accused. If there are more than one accused and have used different arms and assaulted at differed parts of the body. It is necessary to know as to which of the injury was fatal and who caused it. To appreciate the same, the evidence of the doctor who issued wound certificate, and who conducted the post-mortem is very important to the case. In a criminal trial

particularly in case of murder or causing injury to a person, the evidence of the doctor is vital. Doctor evidence supports to know as to which injury was fatal and caused the death. It also helps the Court to know which injury was grievous and which was simple. It also helps to know which weapon could have caused such injuries.

11. The duty of the Court is not just record the evidence who have been examined, but also to see that the evidence of witnesses who are important in ascertaining the truth. Even if the prosecution fails to examine the material witness, the Court is not precluded from getting the witness summoned.

12. Section 311 of Cr.P.C. confers ample power on the Court to summon witnesses and examine, recall, re-examine. Even the person not named as witness can also be summoned. The object of this provision is to enable the Court to find out the truth and to render a just decision. The witness can be summoned at any stage of the inquiry or trial. However, this provision has to be used judiciously and not arbitrarily. If the examination of witness is necessary and without which there would be failure of justice, the Court should exercise its discretion.

13. It is the duty of the Court to see that the witnesses are examined to prevent failure of justice or for rendering just decision. Even if the prosecution fails to examine the witnesses who are necessary for the case the Court should summon such witness and examine them.

14. In this case the injured is the complainant, who has been issued with witness warrant on 29.6.2004. On the very next day, she is sought to be given up by the prosecution, as no purpose would be served by examining her. No doubt, PWs 1 and 2 -- Sons of deceased have not supported the case of the prosecution, but that does not mean that, another injured eye witness i.e., complainant should be given up as unnecessary. However, the trial Court has blindly accepted the submission of the prosecution and has permitted the complainant witness to be given up, that too without knowing whether witness summons is served or not. Complainant has voluntarily appeared on 2.7.2004 and got herself examined. Section 311 of Cr.P.C. confers power on the Court to summon the witnesses at any time of the enquiry, or the trial or the proceedings or examine any person in attendance, though not summoned as a witness. When the charge sheet discloses the material witnesses and the material documents to prove the nature of injury, who caused the injury, which injury is fatal, which injury has resulted in the death of deceased, it is necessary to decide as to whether the death is homicidal or is a natural death. To prove the same, the evidence of the doctor is necessary. In this case, the Court has not even cared to issue summons to the witnesses viz., Medical Officer, Athani to know the nature of injuries sustained by the deceased and the Medical Officer at Bijapur and also the Medical Officer at Miraj. Deceased had suffered injury on the date of incident i.e., 18.12.1997. He survived till 7.2.1998 i.e., 51 days. The records of the hospital, where he was treated for 51 days are material documents to know whether the death of the

deceased is due to injury or for any other reason. When the accused have been charged for an offence punishable u/s 302 of IPC, the most important material is the medical evidence to prove the nature of injury and to prove which injury is fatal. The Police Officer who investigated the matter, had placed all the material before the trial Court. It is the duty of the Court conducting the trial against the accused, to summon such of the witnesses who are material and vital to the case. Strangely the Court by giving a short adjournment of one day and giving up all the material witnesses has proceeded to conclude the trial, which has resulted in acquittal of the accused. The evidence lead by the prosecution viz., PWs-1 to 8 will not prove as to which of the injury was fatal and which injury resulted in death of the deceased. In the absence of medical evidence, in our opinion, the Fast Track Court, which conducted the trial, should have examined the Doctors. These witnesses are the prosecution witnesses and have been listed in the charge sheet as prosecution witnesses and without the relevant witness is examined the documents are marked with consent as Ex. P3 to P7. It is unknown as to how these documents could be marked without even the relevant witness is examined. On examination of the necessary witnesses, if there was no objection for marking of the document, the Court could mark the document, but even before the witnesses being examined, by consent documents are marked, it is needless to say how important the medical evidence is, even in case of consent given by the accused marking the document, the examination of witness is necessary. Full Bench of this Court in a judgment reported in Boraiah alias Shekar Vs. State, in the matter of Boraiah @ Shekar Vs. State by Ramanagaram Police, 2003 (3) KCCR SN 152) at para-11 has observed thus:

11..... We may however add a word of caution that the medical evidence in a criminal case is of utmost importance as the correctness of both ocular and circumstantial evidence produced by the prosecution is tested on the touchstone of the medical evidence. Therefore, even if the genuineness of the Post Mortem report is not disputed by the accused and the report is read as substantive evidence in the case, it may still be necessary to examine the doctor concerned to clarify his opinion mentioned in the PM report or to obtain his opinion on questions of medical nature if the Court feels it absolutely necessary to clarify the questions of a medical nature which may be involved in the case by calling the doctor who has issued the PM report in order to arrive at a correct decision in the case. This may be done by the trial Court by examining him u/s 311 Cr.P.C.

This Court has observed that, even if the genuineness of the post mortem report is not disputed by the accused and the report is read as substantive evidence in the case, it may still be necessary to examine the doctor concerned to clarify his opinion mentioned in the post mortem report or to obtain his opinion on questions of medical report if the Court feels it absolutely necessary to clarify the questions of a medical nature which may be involved in the case by calling the doctor who has issued the PM report in order to arrive at a correct decision in the case.

15. The postmortem report itself cannot be used as a substantive piece of evidence until and unless Doctor's consent has been given. Where the Medical Officer is not examined, the post mortem report even if it is accepted, in the absence of the evidence of the doctor who issued the same, the post mortem report cannot be treated as evidence. The opinion requires to be explained.

16. In case, the Doctor who conducted the post mortem or the Doctor, who issued the wound certificate was not available, another Doctor can be summoned to give his opinion on the basis of the documents produced. When the accused are tried for the serious offence and the prosecution, which is required to place all the material to prove the truth having placed certain documents, it is not for the Court to ignore such material or describe the witnesses as unnecessary or to treat them hostile even before they are examined and it is not a procedure contemplated for conducting criminal trial. We deprecate such a method very strange procedure is followed in this case. In as much as, a memo is filed to treat some of the witnesses as hostile, even before they were examined even without knowing whether the witnesses support the prosecution cause or not. Assuming that witnesses examined have not supported the case of the prosecution, it is still open to the prosecution to cross-examine them and ascertain the truth. The object of the prosecution is to place truth before the Court as the evidence produced by the prosecution are vital, it is the primary duty of the prosecution to place all the relevant evidence and material before the Court. Even if the prosecution fails the Court must summon such witness and document which are necessary for arriving at a just decision. Looking at the order sheet and the observation made by the learned trial Judge for acquittal, we find that the trial Court has totally misdirected itself from conducting the criminal trial in accordance with the procedure in law. Hence, we find that the examination of the Doctor and marking of wound certificate, post mortem report is necessary and the opinion of the medical officer is necessary to know the nature of injury, and cause of death etc. For this limited purpose, we find it necessary to remit the matter to the trial Court for reconsideration.

Accordingly, we allow this appeal and set aside the judgment of acquittal passed by the Additional Sessions Judge, Belgaum in Sessions Case No. 109/1998 dated 16th July 2004 and remit the matter to the trial Court to proceed with the trial by examining the Doctors and getting their opinion explained and also summon such of the documents, which are necessary for just and proper trial in the case.

Since the accused are already on bail during the trial and they are also on bail during the pendency of this appeal, the accused shall be granted bail by the trial Court, if the application is filed.