
(1998) 08 AP CK 0031
In the Andhra Pradesh High Court
Case No : Criminal P No. 2405 of 1997

T.R. Narasimhulu

APPELLANT

Vs

State of A.P.

RESPONDENT

Date of Decision : 21-08-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 252, 311, 391
Penal Code, 1860 (IPC) — Section 304

Citation : (1998) 5 ALD 736 : (1998) 2 ALD(Cri) 635 : (1999) 1 ALT 794 :
(1999) CriLJ 30

Hon'ble Judges : Bilal Nazki, J

Bench : Single Bench

Advocate : Mr. Masthan Cherukuri, for the Appellant; Public Prosecutor, for the Respondent

Judgement

1. The facts leading to the filing of this petition are that the petitioner - accused was charged of offence u/s 304-A of IPC and was under trial before the III Additional Munsif Magistrate, Tirupathi in CC No.222 of 1990. The trial was completed on 20-12-1994 and the petitioner was convicted u/s 304-A IPC and also u/s 252 of Cr.P.C. He was sentenced to imprisonment for one year. Against this order of conviction and sentence he filed an appeal before the learned Sessions Judge being CrI.A.No.20 of 1995 which was decided by the III Additional Sessions Judge, Chittoor at Tirupathi on 10-6-1997. The learned Trial Court had relied heavily on the evidence of PW1 and convicted the petitioner. The case of the petitioner before the appellate Court was that he had not been given opportunity of cross-examining PW1 who was the pivotal witness in the case, therefore the conviction could not be sustained. I have seen from the records that PW1 who was the eye-witness had been examined on 17-6-1992 partly and on 26-6-1992 his examination in chief was completed. The case was deferred for cross-examination of PW1 on 26-6-1992, but the prosecution did not cause the presence of PW1 till 21-7-1993 and the trial Court closed the evidence of PW1. But, the Magistrate had done all that was within his power to secure the

presence of PW1 and had issued even bailable warrants. Such bailable warrants also had to be executed by the Police concerned and they were not executed, therefore he closed the evidence of PW1 on 21-7-1993. It appears that the learned Sessions Judge agreed with the contentions for the petitioner that he has been prejudiced as PW1 who was the material witness in the case was not cross-examined by him and it was not due to the fault of the petitioner that PW1 was not cross-examined. It was the fault of the prosecution itself not to produce PW1 for the purpose of cross-examination. In any case, the petitioner's case is that PW1's evidence given by him in the examination-in-chief could not be read against him in the absence of having given him a chance to cross-examine the said witness. The learned Sessions Judge appears to have agreed with this, but remanded the case in terms of Section 391 of Cr.P.C. to the Trial Court for securing the presence of the witness and allowing the petitioner to cross-examine. This order of Sessions Judge has been challenged in this petition.

2. I have heard the learned Counsel for the parties in detail.

3. A reference has been made to several judgments of the Supreme Court and also of this Court. The Courts are empowered to get additional evidence in order to do complete justice in the matter. But, such orders cannot be passed if an attempt is sought to be made to fill up the lacunae in the cases. This is the settled position of law. Seeing in the light of this settled position of law, I find that the course adopted by the learned Sessions Judge was not only illegal but unfair also. The witness has been examined in the year 1992. It will be not fair to direct the accused to cross-examine the witness on the basis of the statement he made in the year 1992 as no1 witness will be in a position to explain in the cross-examination the interpretations to his statement made in the year 1992. When a witness is examined the law presumes that the witness is examined and cross-examined continuously. If a witness is examined on a particular day and is being cross-examined after five years, in my view prejudice is bound to be caused either against the prosecution or against the accused.

4. Coming to the authorities the learned Judge has relied on two judgments one being State of U.P. Vs. Anil Singh, . There is no quarrel with the principle laid down in this judgment that the Presiding Officer should see that innocent should not be convicted and real culprits should not go scot-free. Another judgment to which the learned Judge has referred is Raghunandan Vs. State of U.P., , The citation given was AIR 1978 SC 463. The learned Counsel for the petitioner submits that this citation is wrong and on page 463 of AIR 1978 SC there is no such judgment as Raghimandan v. Stale of U.P. This Court however found that while making the citation the learned Judge has wrongly shown it as AIR 1978 SC 463 whereas the case can be found as Raghunandan v. State of U.P. in (supra). In that case the facts of the case were altogether different than from the present case. A Doctor had performed a post-mortem examination. He was examined in the trial but no question was put to him by either side to illucidate certain information. In that context the Supreme Court made the observations

which have been quoted by the learned Sessions Judge.

5. On the other hand the learned Counsel for the petitioner has submitted a judgment of Supreme Court in *Bir Singh and Others Vs. State of Uttar Pradesh*, a . While considering the powers of the Court to call for additional witnesses or additional evidence the Supreme Court found that:

"11.....

It is well settled that though an Appellate Court has power to take additional evidence in a suitable case yet the discretion should not be exercised to fill up gaps or lacunae in the prosecution evidence. If the prosecution was serious about this matter there was rib reason why Ejaz Hussain could not be examined before the Sessions Court....."

He has also relied on a judgment of the Division Bench of this Court in *Bala Subbarayudu v. State of A.P.*, 1994 CrLJ 1484. In this judgment also this Court made the following observations:

"6. In order to decide this question, the most crucial evidence is that of the doctor who conducted autopsy on the body of the deceased. The Public Prosecutor who conducted the prosecution in the trial Court has filed a memo on 26-10-1992 in that Court stating that the prosecution was giving up the evidence of the doctor and another witness although they both were cited as list witnesses. u/s 391 of the Code of Criminal Procedure, the appellate Court has power to take further evidence if it thinks that additional evidence "is necessary" or it may direct a Magistrate or a Court of Session to take such evidence. The power u/s 391 of the Code of Criminal Procedure cannot be exercised if the prosecution had ample opportunity to examine a witness but refrained from doing so, especially when a Memo was filed giving up a witness."

The Division Bench also had an occasion to refer the case of *Bir Singh v. State of U.P.* (supra) to which a reference has been made herein above, while dealing with the case in *Bala Subbarayudu v. State of A.P.* (supra). In *Bala Subbarayudu*'s case the Public Prosecutor had made a request before the High Court that the Doctor be re-examined because the Doctor who had conducted post-mortem examination on the body of the deceased had not been examined during the trial. It was stated by the Public Prosecutor that the evidence of the Doctor concerned was crucial to the case. During the trial the prosecution had itself given up the evidence of the Doctor and some other witness though both had been cited as witnesses. The judgment of *Raghunandan v. State of U.P.* (supra) was also pressed into service before the Division Bench. The Public Prosecutor had relied on para-9 of *Raghunandan*'s judgment which is reproduced below:

"9.....

If the trial Court had failed to consider their importance, the High Court could have and should have taken further evidence on this matter u/s 540 Cr.P.C. In a

criminal case, the fate of the proceedings cannot always be left entirely in the hands of parties. The Court has also a duty to see that essential questions are not, so far as reasonably possible, left unanswered."

The Division Bench found that, the above law has no application in a case where the prosecution had deliberately given up the evidence.

6. Another judgment relied upon by the learned Counsel for the petitioner is Nishar Ahmed Faj Mohammed Kaji v. State of Gujarat, 1998 SCC (CrL.) 967. In this case, an application was made for getting evidence of an independent witness after seven years of the occurrence which was rejected by the High Court on the sole ground that the application for examining the witness after a lapse of seven years from the date of occurrence cannot be considered. The Supreme Court upheld the direction of the High Court.

7. For all these reasons, I find that the order passed by the learned Sessions Judge is not in conformity with the settled principles of law and also will amount to abuse of judicial process. The petitioner is facing trial from the year 1990, eight years have passed and still the petitioner-accused does not know about his fate. How long this man will be made to suffer without knowing the result of the case in which he was involved.

8. For these reasons, I allow this petition by setting aside the order of the learned Sessions Judge and remand the case back with a direction to the learned Sessions Judge to dispose of the appeal within two weeks from the date of receipt of a copy of this order on merits on the basis of evidence on record.