

(2001) 04 MP CK 0033

Madhya Pradesh High Court (Gwalior Bench)

Case No: Miscellaneous Criminal Case No. 2217 of 2000

State of M.P.

APPELLANT

Vs

Parma and others

RESPONDENT

Date of Decision: April 30, 2001

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313, 318, 341
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 324

Citation: (2001) 3 MPHT 118 : (2001) 2 MPLJ 318 : (2001) 3 RCR(Criminal) 372

Hon'ble Judges: R.B. Dixit, J; Mr. S.P. Srivastava, J

Bench: Division Bench

Advocate: Shri J.P. Sharma, for the Appellant; Shri R.K. Shrivastava, for the Respondent

Final Decision: Partly Allowed

Judgement

R.B. Dixit, J.

This reference u/s 318, Cr.P.C. arises out of a judgment and order of conviction passed in S.T, No. 53/99 of Second Additional Judge to Sessions Judge, Guna at Ashoknagar whereunder the accused persons were found guilty of offence under Sections 147, 148, 302, 325, 324/149, IPC, however case of accused Hamira has been reserved and referred for passing order regarding imposition of sentence against him.

The facts in brief shorn of details as they emerge from the perusal of the record and are necessary for the disposal of this case lie in a narrow compass:

On 8-8-1998 at about 7.00 p.m. complainant Munna Lal (P.W. 1) was surrounded by the accused persons, who were armed with lathis and farsa and was challenged for passing his plough from their field, however he was assaulted by all the accused persons with lathi and farsa. When his mother, brother deceased Bharosa, Udhram Chand and Dulli Chand intervened, they were also assaulted by the accused

persons. Lallu inflicted a fatal farsa injury on the head of the deceased Bharosa, which resulted in his death.

At the time of the framing of charges against the accused persons, it was not found nor objected to on behalf of any of the accused persons that accused Hamira is deaf and dumb. The learned Trial Judge while recording his plea of not guilty to the charge also did not feel that Hamira is deaf and dumb. However, on 21-10-99, it is only at the time of recording the cross-examination of complainant, Munna Lal, an application u/s 318, Cr.P.C. was moved on behalf of accused Hamira to the effect that he is deaf and dumb and unable to understand the proceedings against him. In view of the matter, the evidence recorded so far could not be used against him and the case deserves to be referred to the High Court for issuance of necessary directions. The learned Trial Court after interrogating accused Hamira at this stage although found him to be deaf and dumb but not to the extent so as to find him unable to understand the proceedings of the Court. The learned Trial Court further held that even if an accused is found to be deaf and dumb, the trial cannot be held up but has to be proceeded on and the case can be referred to the High Court u/s 318, Cr.P.C. only when he is found guilty of the offence with which he is charged.

In a decision in case of State Vs. Genda, reported in AIR 1954 MB 34, it was pointed out that the Court cannot refer a case in the midst of a trial before any conviction or committal takes place. The Court is required to proceed to the end of the trial and it is only if the trial results in a conviction then the question of forwarding the proceedings to the High Court u/s 341, Cr.P.C. would arise.

The Kerala High Court in reference of [In Re: Padmnabhan Nair Narayanan Nair](#), where the enquiry as to the capacity of the accused to understand the proceedings in Court proceeded the preliminary enquiry and the Magistrate who conducted the latter enquiry did not endeavour to see whether the accused can be made to understand the proceedings had observed that it is incumbent on the High Court to direct the Sessions Judge to ascertain for himself whether the accused can be made to understand the proceedings with the help of his relations or friends. It is the Court's duty to make a proper endeavour to see whether the accused can be made to understand the proceedings. If the Judge finds that the accused can be made to understand the proceedings the trial must proceed in the ordinary way. On the other hand, if the Judge takes the same view as the Committal Court as to the accused's physical and mental capacities the procedure prescribed u/s 341 should be followed. If the trial proceeds in the ordinary way, the Court can pass sentence if the accused is found guilty and convicted. However, if it is found that the accused cannot be made to understand the proceedings, the Court can convict him if the evidence warrants it, but it cannot pass sentence against him. The Court must forward the proceedings to the High Court to pass such orders as the High Court thinks fit.

In another decision of Kerala High Court in reference of Peethambaran, reported in In Re: Peethambaran, it was made clear that the provisions of Section 341 can be invoked only when the accused is unable to follow the proceedings. The Court making the reference should record a finding as to whether the accused, though a deaf, mute had sufficient intelligence to understand the criminal character of the act committed by him. To sustain a conviction, against such a person, the Court trying him should not only be satisfied that he is same but also that he is of sufficient intelligence as to know the criminal nature of the act he commits. There is no provision in the Indian Penal Code under which a person found to be guilty of an offence could be exempted from punishment merely because he is deaf and dumb.

The learned counsel of the respondent-accused has referred the decision of Mysore High Court in case of State Vs. Mogamma, reported in AIR 1964 Mys 182, wherein it has been held that before the Court can refer a case u/s 341 (analogous to Section 318 of present Cr.P.C.) for orders to the High Court, it must find that the accused cannot be made to understand the proceedings and that the enquiry or trial must result in commitment or conviction. If these requirements are not fulfilled, the proceedings cannot be forwarded to the High Court.

In a reference in case of Beda, reported in AIR 1970 Orissa 3, where the Magistrate had simply recorded his conclusion that the accused is deaf and dumb and has committed the accused to take his trial before the Sessions Court. It was pointed out that it is hardly sufficient to make a reference u/s 341 (of old Cr.P.C.). It is also necessary for the Sessions Judge to ascertain for himself whether the accused can be made to understand the proceedings with the help of relations and friends and if necessary to keep him under medical observations to enable him to come to his conclusion. If he finds that the said accused can be made to understand the proceedings, he will proceed in the ordinary way. If on the other hand, he is satisfied that the said accused cannot be made to understand, the proceedings of the Court, the procedure prescribed u/s 341, Cr.P.C. should be followed.

It has to be noticed that in so far as Section 341 of the old Cr.P.C. is concerned, a reference to the High Court was also provided, if enquiry results in a committal. However, in so far as Section 318 of the present Cr.P.C. is concerned, the words "if enquiry results in a commitment" of the old Cr.P.C., have been omitted. In such a situation, the question of making a reference to the High Court before such proceedings result in a conviction, does not arise as has been held in the decision of the Court in case of Genda (supra).

The learned counsel of the respondents has also referred the decisions of the Hon'ble Supreme Court in case of Sharad Birdhichand Sarda Vs. State of Maharashtra, and 1997 (2) ALD (Cri) 131 (SC) pointing out that non-examination of the accused respondents u/s 313, Cr.P.C. is fatal. However, we are of the opinion that the cases of the Apex Court as referred by the learned counsel of the respondents have nothing to do with the proceedings against the person who is

deaf and dumb. The non-examination of the accused u/s 313, Cr.P.C. in case of deaf and dumb does not cause any prejudice to him because a special provision envisaged u/s 318 of Cr.P.C. has been provided in making his reference to the High Court. In case of accused, who is deaf and dumb and against whom a finding of conviction is returned by the Trial Court, the High Court has to satisfy itself whether a fair trial was conducted against him.

Now, in so far as the present case is concerned, the learned Trial Court had himself examined the accused to satisfy that he does understand the gestures made to him. It is further to be noticed that a joint trial was conducted against number of accused persons including Hamira and one of his brothers. They were all represented and properly defended by the different Advocates of their choice. Proper cross-examination of the witnesses was also carried out on behalf of the learned counsel of the defence. In such a situation, we are of the considered opinion that the trial was conducted fairly and sufficient opportunity to meet out the case was also afforded to the accused persons including the respondent Hamira.

The High Court while examining the material on record may pass such orders as it thinks fit. It may convict or discharge the accused or direct retrial or keep him in jail. In the light of these observations, therefore, now we proceed to examine the evidence against the respondent-accused.

Munna Lal (P.W. 1) when he was coming back after ploughing the field, accused persons intercepted him and asked him as to why he had passed from their field. When he assigned the reason that his bullocks were unable to cross another way from a paar, Mani Ram assaulted him with lathi and Patru with Kulhadi on his head and Lallu with farsa on left hand. When deceased came for his help, he has assaulted by Lallu with farsa and Patru with Kulhadi, Duli Chand, Udhampur and Parwati Bai were also assaulted by all the accused persons. He has admitted that accused Hamira is deaf and dumb and his parents had already died. Accused Patru and Hamira are real brothers. He has also admitted previous enmity with some of the accused persons. He has also admitted that he was not assaulted by accused Hamira. The fact of deceased being assaulted by Parma, Madan, Mani Ram & Hamira is admitted to be absent from FIR (Ex. P-2) and his case diary statement (Ex. P-4).

Parwati Bai (P.W. 3) of course has not particularly named this accused for causing assault to any of the person, however, according to her, accused was also found engaged causing assault with other accused persons. According to this witness, although Hamira could not speak, but he hears and understands the gestures. It has also been admitted that soyabean crop was sown in the Khutawala field, situated in Silawan Haar, which belongs to accused Patru and Hamira. Munna Lal has admitted that Hamira used to obstruct him in passing from the aforesaid field.

Although, Rambati Bai (P.W. 2) has made omnibus allegation against all the accused persons regarding assault of the deceased, however, what she has special to say against accused Hamira is that she was also assaulted by this accused. This allegation against Hamira on the other hand is not found corroborated by any medical evidence.

Another injured Duli Chand (P.W. 4) when intervened was assaulted by Patru with Kulhadi and Lallu with farsa. He could not state as to who and where all the accused persons had assaulted the deceased.

Udham (P.W. 5) has stated that when he reached on the spot, he was caught hold by Mani Ram and on his making a gesture towards Hamira, he was assaulted by Hamira with lathi on his back.

Shiv Raj Singh (P.W. 8) although declared hostile by the prosecution has admitted that Hamira by his gesture pointed out that he was also beaten in this incident.

Ram Dayal (P.W. 11) was also declared hostile. However, he has admitted that deceased had followed Hamira when both were coming from the field and abusing each other. Thereafter Patru was assaulted by some of the members of the complainant party. Another hostile witness Bhajna (P.W. 3) has testified that Patru and Hamira had also received injuries in the incident.

Dr. H.H.N. Garg (P.W. 20J), who examined Patru, found lacerated wound on his head and contusions on the back. Accused Hamira was also examined by him and found following injuries on his person :

- (1) Lacerated wound 1/2" x 1/4" skin deep on right eye-brow;
- (2) Contusion 1/2" x 1/4" on right side of the chest; and
- (3) Contusion 1/4" x 1/4" on posterior aspect of right hand.

Taking into account the evidence referred hereinabove, we are of the opinion that there is no evidence against Hamira indicating any intention on his part to have assaulted the deceased. However, there is evidence to show that the quarrel between the parties had started as of sudden because it was found that complainant Munna Lal had caused damage to the soyabean crop of accused Hamira and his brother Palru by taking out bullocks with plough from their field. First it resulted into wordy quarrel between parties and then deceased was assaulted by some of the accused persons and the role of Hamira at this juncture seems to be assaulting other injured witnesses, who had gathered on the place of occurrence for saving the deceased. Although one of the injured had received grievous injuries also. In such a situation although Hamira himself was one of the members of an unlawful assembly, however, he has not shared the intention of causing death of the deceased with other co-accused persons as the role assigned to him was limited only to the extent of causing simple or grievous injuries to

others. Since the injuries on the person of Hamira were simple in nature, it is difficult to presume that non-explanation of his injuries by the prosecution will create a right of self-defence in his favour.

The cumulative effect of the evidence discussed hereinabove, in our opinion, is that there is no evidence u/s 302 read with Section 149, IPC against accused Hamira. However, there is evidence against him under Sections 147, 325 read with Section 149, IPC, At this juncture, we would also like to make it clear that our observations regarding evidence and mode of offence referred hereinabove is confirmed only to the role assigned to accused Hamira, which should not prejudice in any way the case of the prosecution in so far as other accused persons are concerned.

In so far as sentence is concerned, the accused Hamira had remained in custody from 9-8-98 to 20-8-98 and 14-9-98 to 30-1-98 for about 5 months. Since he has also suffered injuries in this occurrence and none in the family to support him except his brother, who has been convicted, in such a situation, in our opinion, the sentence already undergone by him will suffice to meet the ends of justice.

For the reasons stated hereinabove, the reference is partly allowed and the conclusion and finding of conviction against the accused-respondent is modified to the extent that accused Hamira is hereby held guilty for committing offence under Sections 147 and 325 read with Section 149, IPC in place of offence under Sections 148, 302, 324 read with Section 149, IPC and sentenced with the sentence already undergone by him.

Misc. Criminal Case partly allowed.