(2001) 01 AP CK 0001

Andhra Pradesh High Court

Case No: Criminal Revision Case No. 902 of 1997

Burudi Jagabandu and Others	APPELLANT
Vs	
State of A.P.	RESPONDENT

Date of Decision: Jan. 25, 2001

Acts Referred:

- Criminal Law (Amendment) Act, 1952 - Section 326, 350, 428

Citation: (2001) 1 ALT(Cri) 230 : (2001) 1 APLJ 396 : (2001) CriLJ 1866

Hon'ble Judges: V. Eswaraiah, J; C.Y. Somayajulu, J; Bilal Nazki, J

Bench: Full Bench

Advocate: K. Sarvabhoumarao, for the Appellant; Public Prosecutor, for the Respondent

Judgement

Bilal Nazki, J.

This is a case of three unfortunate people who belong to a tribal area. These people from tribal areas have been continuously deprived of the legislations and amendments in legislations which ares meant for the benefit of the general public. In the garb of protecting the rights and interests of the tribals and tribal areas this Court feels that they are being deprived of benefits of modern day legislations. Whereas whole country is governed by a Criminal Procedure Code which was legislated in 1974 and which takes care of the requirements and aspira-tions of a modern day criminal judicial system at least up to the year 1974 but these people of tribal areas are forced to face the criminal judicial system as was relevant in 1898. More than a century has passed after this Procedure Code was enacted by an authority which was colonial but nothing is being done to upgrade the system as far as these areas are concerned. We feel sorry for the petitioners but we are governed ourselves by a system which we cannot flout. The judgment we are going to pass presently is against our conscience but at the same time by the shackles of the system we are also helpless.

2. The petitioners are facing a criminal trial in a Sessions case from the year 1994. Twelve witnesses had already been examined and the case was almost ripe for final disposal when to their misfortune the learned Sessions Judge got transferred. The new Sessions Judge applying the rules laid down in Section 350 of the old Code of Criminal Procedure ordered re-summoning of the witnesses for recording their statements afresh. The petitioners filed a memo stating therein that they would have no objection if their case was decided on the basis of evidence already recorded and witnesses should not be summoned for deposing afresh. The learned Sessions Judge considered the matter and in view of judgment of this High Court in K. Bojji Reddy v. State of A.P. 1995 (1) ALT (CrI) 43 : 1995 Cri LJ 699 held that he had no power to decide the matter on the basis of the evidence recorded by his predecessor. This order was challenged by the petitioners. The matter came up before our learned brother Justice K.B. Siddappa as he then was. He referred the matter to the Bench. In his reference order ,also it is clear that he also felt helpless in the matter though he wanted that the petitioners should not be put to agony of examining 14 witnesses again; but he could not help the petitioners in view of the Division Bench judgment, to which a reference has been made hereinabove. Therefore, he referred the matter to this Court.

3. We have heard the learned counsel for the parties at length. Basically this is a matter which has to be considered by the legislature and this Court also finds helpless to pass an order which it thinks would be right in the circumstances of the case. It is not only the judgment of Division Bench of this Court in K. Bojji Reddy v. State of A.P. (1 supra) which comes in our way but it is the old Code of Criminal Procedure itself which comes in our way. There is on doubt that the matters pending before the Sessions Judge in the tribal areas have to be conducted in accordance with the old Code. It is stated at the Bar that by notification issued in G.O. Ms. No. 485, Home (Coiurts-B) department, dated 29-3-1974 the Governor of State of Andhra Pradesh in exercise of the powers conferred on him under sub-para (1) of paragraph 5 of the V Schedule of the Constitution of India has excluded the application of the provisions of the Code of Criminal Procedure, 1973 to the schedule areas in the State of Andhra Pradesh but has reserved the power to make provision of their application in future. Therefore it follows that, as for present the provisions of Code of Criminal Procedure, 1898 are applicable to the tribal areas. Section 350 of the old Code creates an exception to the general rule of ''one who hears must decide'' in favour of Magistrates but not for any other class of Judges. The controversy before this Court and the controversy before the Division Bench was same and the Division Bench was of the opinion that, on change of a Judge trial has to start afresh and the evidence already recorded cannot become a basis for the judgment of the new Judge. Therefore the Division Bench set aside the conviction and ordered a retrial. In our opinion the Division Bench was right because Section 350 in old Code does not permit a Judge to decide a case on the basis of evidence recorded by his predecessor and if such a course is adopted it goes to the root of

the matter and the trial itself becomes incompetent. This was held by the Supreme Court as well in the case of Payare Lal Vs. State of Punjab, in which the issue was directly considered by the Apex Court though the controversy before the Supreme Court was with respect to a Special Judge. Although Special Judges were brought within the ambit of Section 350 of the old Code by an amendment in 1958 but the matter be-fore the Supreme Court had been decided by a Special Judge before the amendment. The learned counsel for the petitioners however relied on a judgment of Supreme Court in Mer Dhana Sida Vs. State of Gujarat, and contends that Payare Lai''s (supra) judgment was not relevant. We have gone through both the judgments. Mer Dhana''s (supra) judgment is not at all applicable to the facts and circumstances of the case. In Mer Dhana''s judgment the Supreme Court was seized of the controversy relating to applicability of Section 428 of the new Criminal Procedure Code but to such of the persons who had been convicted before the new Code came into operation. Therefore that judgment is not at all relevant. Another argument was made that after the 1958 amendment the Special Judges were also brought within the ambit of Section 350 therefore it should be deemed that Section 326 would also apply to the Sessions Judges. This argument cannot be accepted at all. Special Judge is a different entity created under the Criminal Law (Amendment) Act, 1952. It is true that a Sessions Judge can be appointed as Special Judge but that does not make a Special Judge a Sessions Judge. A Sessions Judge is appointed under the Code of Criminal Procedure and had it been the intention of the legislature to include the Sessions Judges in the Special Judges category then there would have not been an amendment in 1974. Section 350 of the old Code was replaced by Section 326 in the new Code. Whereas Section 350 of the old Code started with the words "Whenever any Magistrate....Section 326 of the new Code starts with the words "Whenever any Judge or Magistrate, ...therefore it becomes abundantly clear that Judges other than Special Judges were not included in 1958 amendment for the purpose of Section 350. It was also contended that since the provision was incorporated in order to be fair to the accused persons therefore once the accused persons themselves state before the Court that they want to get the case decided on the basis of the evidence recorded by a Judge who is not deciding the case such a course should be allowed. Though we have sympathy with the petitioners we cannot accept such an argument in view of the judgment of the Supreme Court in Payare Lal''s case (2supra). The Supreme Court was clear to lay down without any ambiguity the following principles, (1) that if a successor Judge proceeds to decide the case on the basis of the evidence recorded by his predecessor it could be an incompetent trial, (2) that such an error cannot be cured. The counsel for the appellant before the Supreme Court made a submission before the Court that the case should not be remitted back for a fresh trial but the Sessions Court should decide the matter on the basis of evidence on record, but the Court found that since the whole trial was bad they would not even look at the evidence on record. Therefore, it follows that, even with the consent of the accused persons the evidence recorded by predecessor of a judge cannot form basis for deciding the

matter by a successor Judge. There were various other judgments referred by the learned counsel for the parties but in view of the clear judgment of the Supreme Court which we are bound to follow we need not go into those judgments.

4. The reference is accordingly answered and the petition is rejected. However, in the light of what has been stated by us hereinabove we deem it proper to request the State Government to look into the matter afresh and see that the provisions of Criminal Procedure Code, 1973 which are beneficial to the accused persons are extended to the tribal areas.

5. The accused persons have already wasted five years, there were fourteen witnesses examined and now they will have to be re-examined. This will take another five years and there is no guarantee that for these five years the learned Sessions Judge would not be transferred. If this state of affairs continue we fear that no trial in tribal areas would ever be completed. Normally the tenure of Sessions Judge is two to three years and it is our experience that in a period of two or three years Sessions trials are not completed. These trials would go on till the accused persons die. Therefore, it is high time to look into it.

A copy of this judgment be sent immediately to the Chief Secretary to the Government of Andhra Pradesh.