
Shivaprasad @ Shiva @APPELLANT@Hash State by Banasawadi Police

Criminal Appeal No. 200 of 2013

Court: Karnataka High Court

Date of Decision: June 25, 2018

Acts Referred:

Code of Criminal Procedure, 1973 " Section 216(4), 217, 232, 313, 374(2), 465, 535,
537#Indian Penal Code, 1860 " Section 302, 306, 392, 397

Hon'ble Judges: BUDIHALL R.B, J; B.A. PATIL, J

Bench: Division Bench

Final Decision: allowed

Judgement

1. This appeal has been preferred by the appellant/accused being aggrieved by the judgment of conviction and order of sentence dated 1.8.2012

passed by the XXXII Addl. City Civil and Sessions Judge and Special Judge for CBI cases, (CCH.34), at Bengaluru, in S.C.No.365/2009, wherein the

appellant/accused has been convicted for the offences punishable under Sections 302, 397 and 392 of the IPC and accordingly he was sentenced.

2. The brief facts of the prosecution case as per the complaint averments are that PW3 one Akshaya Kumar is the complainant in this case who is the

natural son of the deceased. He lodged the complaint on 27.6.2008, wherein he has stated that he is staying with his mother and sister at the address

mentioned in the complaint. They are only two kids to their parents. He is studying in 8th standard in CMR National Public School. His sister is

studying Engineering in Vemana Institute of technology at Koramangala in 6th semester. His father is working in Abudabi. He last visited them in

April in the year 2008 and returned back in May 2008. Right now only the complainant, his mother and sister is staying in the said address. He further

stated that he went to the school at about 7.30 a.m. for project work, at the same time his sister also left home to the college. He came back from

school at 4.00 p.m. and he returned by his bicycle. He rang his bicycle bell as usual when he returned back to home and usually his mother used to

come and open the door. On that day, his mother did not come out to open the door. He noticed that the gate was open and he peeped through the

window, he saw his mother was laying on the floor. He pushed and opened the door and went inside and saw that pillow was covered to her face and

he removed the said pillow. He saw that the blood was on the ground near the neck. He also saw the blade stained with the blood was fell on the

ground. He tried to wake her up, but she did not respond. He went and called the neighbour Mrs.Ragamma. She came and found that the deceased

was lying in a pool of blood. They found that his mother has been murdered by some one. They went to the first floor and went to the master bed

room, he noticed that Almirah and Cupboards are opened, the empty jewellery boxes were lying on the floor. All jewellery and cash were missing.

Then he went to the police station and filed the complaint and requested the police to ascertain the culprits and to punish them in accordance with law.

3. On the basis of the said complaint a case came to be registered in Crime No.299/2008 for the offence under Section 302 of the IPC and firstly the

FIR came to be registered against the unknown persons and subsequently the present appellant/accused has been apprehended. After investigation

the Investigating Officer filed the charge sheet against the accused persons for the offence under Section 302 of the IPC.

4. After considering the materials the learned Sessions Judge prepared charge against the appellant/accused for the offence under Section 302 of the

IPC subsequently offences punishable under Sections 392 and 397 of IPC were also included in the charge. When the charge was read over and

explained to the appellant/accused he pleaded not guilty and claims to be tried. Hence, charge was framed, plea was recorded, then matter was set

down for trial. Prosecution in support of its case in all examined 24 witnesses and produced 62 documents with sub-markings and also got marked 94

material objects.

Ã, Then the accused has been examined under Section 313 of the Cr.P.C. The incriminating material was read over to him by framing the

questionnaire and whatever the answer given by the accused persons were recorded in the said statement.

5. On the side of the defence, no witnesses were examined, but during the course of cross examination by the prosecution witnesses documents at

Exs.D1 to D3 were got marked.

6. After considering the materials placed on record and hearing the arguments of both the sides the learned Sessions Judge convicted the appellant/

accused for the offences punishable under Sections 302, 392, 397 of the IPC. Accordingly, he was sentenced.

7. Being aggrieved by the judgment and order of conviction so also the sentence and also challenging the legality and correctness of the said judgment

and order of conviction on the ground which is mentioned at ground Nos.4 to 8 the appellant/accused is before this Court.

8. We heard the arguments of the learned counsel appearing for the appellant/accused, so also the arguments of the learned High Court Government

Pleader for the respondent-State.

9. Learned counsel for the appellant/accused made the submission that there are no direct witness to the incident. Case of the prosecution rests on the

circumstantial evidence. He also made further submission that even with regard to the circumstances also there is no cogent and acceptable evidence

through the mouth of the prosecution witness to establish the charges and circumstances relied upon by the prosecution.

10. The learned counsel further made the submission that three Police Constables who said to have apprehended the accused persons were not at all

examined before the Court. In order to establish where and at what time and on which day the appellant/accused has been apprehended. It is also his

submission that so far as the panch witnesses are concerned, the local responsible persons were not at all taken as panch witnesses and the police

selected the persons on their choice. He also made the submission that all details are not at all produced. The learned counsel further made the

submission that so far as the voluntary statement said to have been given by the accused persons and the recovery at the instance of the accused

persons, there is no acceptable and worth believable evidence placed by the prosecution. He also made the submission that during the course of the

trial when 23 witnesses were examined, till such time, the only charge by the accused persons was 302 of the IPC, but subsequently at the request of

prosecution two more charges were added to the original charge and added charges were for the offence under Sections 397 and 392 of the IPC. In

this connection also the learned counsel made the submission that the trial Court has not at all given the opportunity to the accused person to recall the

23 witnesses who have been already examined for the purpose of further cross examination. Hence he submitted this leads to illegality and he has

been completely deprived of the opportunity of cross examination of the prosecution witnesses so far as added charges are concerned. Hence, the

learned counsel submitted because of this reason the entire proceedings are vitiated and hence the judgment and order of conviction passed by the

Court is not sustainable in law.

11. Learned counsel also made the submission that the voluntary statement said to be by the accused person is created by the prosecution. The

learned counsel however made the submission that at the earliest point of time immediately after the incident none of the prosecution witnesses raised

a suspicion about involvement of the appellant/accused in committing the alleged offences. Participation of the accused in committing the alleged

offences is not at all established by the prosecution with the acceptable material. Learned counsel further submitted that so far as the evidence of the

finger print expert, no prior permission from the concerned Court was obtained to take the finger impression of the accused person. Hence he

submitted that this itself leads to illegality in coming to such conclusion. It is also his submission that the documents under Ex.P55 series were not at all

produced before the Court originally, but they were produced before the Court subsequently and regarding production of these documents there is no

proper explanation on the side of the prosecution. Hence, the learned counsel submitted that the judgment and order passed by the Court below is

illegal and prosecution failed to establish the charges beyond all reasonable doubt. Looking to the prosecution material reasonable doubt arises as to

the case of the prosecution. Hence, he made the submission that appeal be allowed and judgment and order of conviction passed by the learned

Sessions Judge be set aside by acquitting the appellant/ accused for all the three charges.

12. Alternatively the learned counsel also made the submission that the matter may be remanded back to the trial Court to give an opportunity to the

appellant/accused to recall the 23 prosecution witnesses examined for the purpose of further cross examination and then the learned Sessions Judge

has to consider the matter afresh and to decide the matter.

13. Alternatively, learned counsel also made the submission that matter may be remanded back to the trial Court giving opportunity to the

appellant/accused to recall 23 prosecution witnesses for the purpose of further cross-examination and then, learned Sessions Judge has to consider the

matter afresh and decide the matter. In support of his contention regarding remanding of the matter, learned counsel for the appellant/accused also

relied upon the judgment of the Apex Court reported in 2004 SCC (Cri) 1603 in the case of Hasanbhai Valibhai Qureshi Vs. State of Gujarat and

others and drew our attention to the relevant para No.9 which, reads as under:-

“9. In Kantilal Chandulal Mehta v. State of Maharashtra it was held that the Code gives ample power to the courts to alter or amend a charge

whether by the trial court or by the appellate court provided that the accused has not to face a charge for a new offence or is not prejudiced either by

keeping him in the dark about the charge or in not giving him a full opportunity of meeting it and putting forward any defence open to him on the

charge finally preferred against him. Section 217 deals with recall, if necessary of witnesses when the charge is altered.”

14. Per contra, learned HCGP for respondent-State submitted that looking to the prosecution materials and after considering the entire materials both

oral and documentary, the learned Sessions Judge has rightly held that prosecution proved all three charges beyond all reasonable doubt and rightly

came to the conclusion in convicting the accused. Learned counsel submitted that there are no direct witnesses to the incident and the case of the

prosecution rests on the circumstantial evidence.

The prosecution led the evidence in proof of the circumstance relied upon by the prosecution. It is also the submission of the learned HCGP that in this

case, prosecution also relied upon the finger prints impression of the accused person and it has been established with the help of the expert

evidence that the finger impressions found are of the accused person on the material objects, which were recovered from the spot. In this connection,

learned HCGP also relied upon a judgment passed by the Division Bench of this Court dated 10.01.2018 in Criminal Appeal No.933/2012 rendered in

the case of Chetan C. Shetty Vs. State of Karnataka, Malleshwaram Police, Bengaluru. Learned HCGP also draws attention of this Court to para

No.25 of the said judgment and submitted that looking to the observations made by this Court in the said paragraphs, it also supports the case of the

prosecution based upon the finger print belonging to the accused person, which has to be established by the prosecution during trial. Learned HCGP

also submitted that the conviction passed by the learned Sessions Judge as against the accused/appellant is legal and does not call for any interference

at the hands of this Court.

15. Learned HCGP also submitted that learned Sessions Judge wrongly rejected the report of the expert regarding finger print of the accused person.

She also submitted that there is no requirement of Law that the finger print of the accused person has to be obtained with the prior permission of the

concerned Magistrate. Hence, she submitted that the lower Court has wrongly rejected the said report. Learned HCGP also drew our attention to the

other materials placed on record and submitted that the prosecution has placed acceptable material so far as the circumstance, which clearly goes to

form a complete chain of circumstances to show the involvement of the accused in committing the offence. Hence, she submitted that there is no

missing link of chain of the circumstances, which have been properly concluded by the Court below and rightly arrived at a conclusion in convicting

the appellant/accused.

16. So far as the contention of the other side regarding the addition of the charges under Sections 392 and 397 of IPC is concerned, the learned

HCGP submitted that after addition of charges, it is for the accused person to take steps by moving an appropriate application making request to the

concerned Court that he wanted to cross-examine the prosecution witnesses, who have already been examined. Therefore, the said witnesses are to

be recalled. Learned HCGP in this connection, submitted that neither the accused nor the counsel appearing for the accused moved such application

before the concerned Court in order to avail the opportunity as contemplated under Section 217 of Cr.P.C. She also submitted that after addition of

two more charges for the offences under Sections 397 and 392 of IPC also, one more witness has been examined by the prosecution and then

accused has been examined under Section 313 of Cr.P.C. Therefore, it cannot be said that by addition of two more charges, the accused has been put

into any sort of prejudice. Hence, she submitted that only on that ground, the judgment and order of conviction cannot be set aside and it is not the

ground for this Hon'ble Court to remand the matter for fresh disposal by the concerned trial Court.

17. In this connection, learned HCGP also relied upon the judgment of the full Bench decision of Hon'ble Kerala High Court in the case of Moosa

Abdul Rahiman Vs. State of Kerala reported in 1982 Criminal Law Journal 1384 and drew our attention to the relevant para No.11 of the judgment

and submitted that even according to this judgment also, no illegality committed by the Court below. At the most, it can be called that there is only

illegality in the procedural aspect. Hence, she submitted that it does not require remanding the matter to the concerned trial Court. Learned HCGP

also submitted that in case of addition or altering of the charges, it is the duty of both the parties i.e., accused as well as counsel for accused to move

necessary application before the Court and there is no duty casted on the Court asking them to make such application. Learned HCGP also submitted

that absolutely there is no illegality committed by the Court below so far as the conviction of the appellant for all three offences. On these grounds,

learned HCGP opposed remanding of the matter to the concerned trial Court. She submitted that the matter does not require any interference at the

hands of this Court.

18. We have perused the grounds in the appeal memorandum, judgment and order of conviction passed by the Court below so also, the sentence

imposed and perused oral and documentary evidence produced by the prosecution as well as defence. We also perused the decisions relied upon by

both sides, which are referred above and perused the principles laid down therein. We have considered the oral submission made by the learned

counsel for the appellant/accused and also learned HCGP at the Bar.

19. Before coming to the merits of the case, it is necessary for us to consider some of the developments that were taken place in this case during the

course of trial. Originally, charge was framed as against accused person for the offence punishable under Section 302 of IPC. 23 witnesses were

examined by the prosecution to prove the said charges and were cross-examined by the defence. After that, the prosecution moved an application

seeking addition/alteration of two more charges into the original charge. The accused person objected the same by filing objection statement. The

application was heard by the learned Sessions Judge on merits and ultimately, allowed the application filed by the prosecution and ordered to add two

more charges for the offences under Sections 392 and 397 of IPC into the original charge. Accordingly, two more charges were added to the original

charge under Section 302 of IPC. At that stage, prosecution made it clear to the Court below that they don't want to be examined or re-examine

the witnesses, who have already been examined as PW.1 to 23 to the added/altered charges. But so far as accused is concerned, nothing was

submitted before the Court and the order dated 09.01.2012 is silent about the side of the accused person. The learned counsel representing the

accused nor the accused himself submitted to the Court that they wanted to cross-examine 23 witnesses further, who have already been examined in

respect of two added charges. The learned Sessions Judge also not specifically asked the accused person whether he wants to recall the witnesses

for the purpose of further cross-examination of PW.1 to 23, whose evidence has been recorded prior to the addition of two more charges under

Sections 392 and 397 of IPC. Then, the prosecution examined one more witness as PW.24 and the statement of the accused was recorded under

Section 313 of Cr.P.C., the arguments were heard and ultimately, the case ended in conviction of the appellant/accused for all three offences

punishable under Sections 302, 392 and 397 of IPC.

20. In view of the submission made by the learned counsel on both sides on this aspect at length, challenging the legality in following such procedural,

it is necessary for us to go through Section 217 of Cr.P.C regarding addition/alteration of the charge, which reads as under:-

“217. Recall of witnesses when charge altered. Whenever a charge is altered or added to by the Court after the commencement of the trial,

the prosecutor and the accused shall be allowed

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for

reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for

the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material.

21. Therefore, looking to this provision, the wordings used in the said Section are, “whenever the charges altered or added to the charge by the

Court after commencement of the trial, the prosecutor and the accused shall be allowed. Therefore, relying upon these words, the learned HCGP

made an interpretation of the provisions that the duty casted on the Court is only if the application is filed either by the prosecution or by the accused

person and if no such application is filed, Court is not having such duty. In this connection, she also refer to the Full Bench decision of Kerala High

Court rendered in the case of Moosa Abdul Rahiman Vs. State of Kerala (cited supra). The relevant paragraph of the said decision is at para No.11,

which reads as under:-

“11. The Allahabad High Court in the above case noted the fact that there was no application by the accused to be permitted to call witnesses and

that there was no oral request either for the recalling of the previous witnesses or to summon new ones. It is thereafter that the following prescient

passage occurs in that judgment:

“There has, therefore, been in my opinion no breach of the provisions of S. 231. It would be instructive to compare those provisions with the

provisions of S. 256 where duty is laid on the Court to ask the accused to state at a particular period of the trial whether he wishes to cross-examine

any and, if so, which of the witnesses for the prosecution whose evidence has been taken. No such duty is laid on the Court under the provisions of S.

231, and so to make those provisions applicable there must be some evidence that the Court refused the request of the complaint or the accused to

recall or sum-non witnesses.

22. We have perused the decision of the Hon'ble Bombay High Court (Nagpur Bench) relied upon by the learned counsel for the

appellant/accused reported in 2011 CRI. L.J. 2220 in the case of Arun Wahane Vs. The State of Maharashtra. He also relied upon the decision of the

Hon'ble Supreme Court reported in AIR 2016 SC 2447 in the case of R. Rachaiah Vs. Home Secretary, Bangalore at para Nos.11 and 12 of the

said judgment, which read as under:-

"11. When we apply the aforesaid principles to the facts of this case, the outcome becomes obvious. The accused persons were initially charged

for an offence under Section 306 of the IPC, i.e., abetting suicide which was allegedly committed by Dr. Shivakumar. It is manifest therefrom that the

entire case of the prosecution, even after repeated investigations and medical examination of the dead body/skeleton of Dr. Shivakumar, was that the

cause of the death was suicide. Thus, after the investigation, what the prosecution found was that Dr. Shivakumar had committed suicide and, as per

the prosecution, the three appellants had aided and abetted the said suicide which was committed by Dr. Shivakumar. On this specific charge, 26

witnesses were examined and cross-examined by the appellants. Obviously, when the appellants are charged with an offence under Section 306 i.e.,

abetting the suicide, the focus as well as stress in the cross-examination shall be on that charge alone. At the far end of the trial, the charge is altered

with "Alternative Charge" with the framing of the charge under Section 302 IPC. This gives altogether a different complexion and dimension to

the prosecution case.

12. Now, the charge against the appellants was that they have committed murder of Dr. Shivakumar. In a case like this, addition and/or substitution of

such a charge was bound to create prejudice to the appellants. Such a charge has to be treated as original charge. In order to take care of the said

prejudice, it was incumbent upon the prosecution to re-call the witnesses, examine them in the context of the charge under Section 302 of IPC and

allow the accused persons to cross-examine those witnesses. Nothing of that sort has happened. As mentioned above, only one witness i.e., official

witness, namely, Deva Reddi, Deputy Superintendent of Police, was examined and even he was examined on the same date i.e., 30.09.2006 when the

alternative charge was framed. The case was not even adjourned as mandatorily required under sub-Section (4) of Section 216 of the Code.

23. So far as the merits of the case is concerned, learned counsel for the appellant relied upon the decision of the Hon'ble Supreme Court

reported in (2016) 16 SCC 418 in the case of Harbeer Singh Vs. Sheeshpal and others.

24. We have perused the principles laid down in the decisions relied upon by learned counsel for the appellant/accused so also, learned HCGP, which

is referred above.

25. Looking to the factual matrix of the case, till 23 prosecution witnesses were examined, the only charge initiated against the accused was under

Section 302 of IPC. It is only thereafter, two more charges were added to the original charge. The object of framing the issues in civil suits and the

charges in the criminal proceedings is to draw the attention of the parties so as to prove that what is the burden on them and what they have to

discharge during the course of the trial. The intention of the Law is that before going to trial either in civil suit or in criminal proceedings, they must

prepare mentally and to select what is the evidence which has to be given before the Court in discharge of the burden casted on them as per the

issues as well as charges. It is also with the object of drawing attention of the parties to the issues as well as the charges. Therefore, after the issues

are settled in the civil suit, charges are framed in the criminal proceedings and the parties will be concentrating on those charges and issues. When the

original charge is laid against the accused person under Section 302 of IPC, the accused and the counsel for the accused supposed to concentrate on

that charge under Section 302 of IPC. Accordingly, they proceeded with the cross-examination of the prosecution witnesses. But, when two more

charges were added to the original charge that too almost at the end of the trial, only one witness was examined by the prosecution. 23 witnesses

were already examined. Therefore, while cross-examining the prosecution witness on the original charge, the attention of the accused or learned

counsel for the accused was not at all drawn towards the proposed charges to be added in future when he was cross-examining the prosecution

witness. Therefore, in this way, we are of the clear opinion that definitely the interest of the accused person is going to be prejudiced by such

procedural cause. After perusing the order sheet of the learned Sessions Judge, application was moved on 09.01.2012 by the prosecution under

Section 216 of Cr.P.C. requesting the Court to add two more charges to the original charge. The matter was not adjourned for the purpose of filing

the objection statement by the accused and the matter was taken up at 1.00 pm objections were filed and then it was heard immediately and

application came to be allowed. Immediately thereafter, the added charges were also framed by the Court and the case was posted to 3.00 pm and

added charges for two offences under Sections 392 and 397 of IPC were prepared and read over to the accused person and his plea was also

recorded. Then, prosecution made it clear that they don't want to re-examine the witnesses in view of the addition of two more charges. But so

far as the accused is concerned, there is no mention in the order as to whether they want to recall 23 witnesses or not? When that is so, we are of the

opinion that the Court ought to have asked the accused person, who was produced from the custody during the course of the trial whether he wanted

to recall the witnesses by making necessary application for the purpose of further cross-examination on the added charges. This was not done by the

Court. In this connection, we also refer to the decision of the Full Bench of the Hon'ble Apex Court reported in AIR 1955 SC 274 rendered in the

case of Nanak Chand Vs. State of Punjab. Para No.13 of the said judgment reads as under:-

"(13) It had been argued on behalf of the prosecution that no finding or sentence pronounced shall be deemed invalid merely on the ground that no

charge was framed. Reliance was placed on the provisions of section 535 of the code of criminal procedure. Reference was also made to the

provisions of section 537 of that Code. Section 535 does permit a court of appeal or revision to set aside the finding or sentence if in its opinion the

non-framing of a charge has resulted in a failure of justice. Section 537 also permits a court of appeal or revision to set aside a finding or sentence if

any error, omission or irregularity in the charge has, in fact, occasioned a failure of justice. The explanation to the section no doubt directs that the

court shall have regard to the fact that the objection could and should have been raised at an earlier stage in the proceedings. In the present case,

however, there is no question of any error, omission or irregularity in the charge because no charge under section 302 of the Indian Penal Code was in

fact framed.. Section 232 of the Code of Criminal Procedure, permits an appellate court or a court of revision, if satisfied that any person convicted of

an offence was misled in his defence in the absence of a charge or by an error in the charge, to direct a new trial to be had upon a charge framed in

whatever manner it thinks fit. In the present case we are of the opinion that there was an illegality and not an irregularity curable by the provisions of

sections 535 and 537 of the Code of Criminal Procedure. Assuming, however, for a moment that there was merely an irregularity which was curable,

we are satisfied that, in the circumstances of the present case, the irregularity is not curable because the appellant was misled in his defence by the

absence of a charge under section 302 of Indian Penal Code.

26. It is no doubt true that looking to the said judgment, the accused in the said case was also convicted for the offence for which they were not

charged at all. It is contended by the prosecution that even for two other offences, the charges were framed by way of addition to the original charge.

Then, the accused has been examined under Section 313 of Cr.P.C. and his statement came to be recorded. Nevertheless, the situation is one and the

same because almost after completion of the trial proceedings i.e., examination of 23 witnesses, only one witness was examined after addition of

charges. An application was moved by the prosecution and same came to be allowed and new two more charges were added to the original charge.

Therefore, it certainly prejudiced the interest of the accused person and in these developments of the said case, we are of the opinion, that it cannot be

said that there is a fair trial and fair procedure was adopted by the court below in recording the proceedings under Section 217 of Cr.P.C. and also

goes to show that in such circumstances to have the fair trial proceedings, it was the duty of the court below to bring to the notice of the accused

person, whether in view of such developments, he wanted to recall the prosecution witnesses or not? Only after that the court below if proceeded, it

could have been said that the fair procedure has been followed in the case. Therefore, whatever the procedure adopted by the court below in this case

it is mere irregularities, which are curable under Section 465 of Cr.P.C. Hence, looking to these material principles laid down by the Hon'ble Apex

Court so also Hon'ble High Courts, we are of the opinion that the appeal will have to be allowed and the matter has to be remanded back to the

trial Court for fresh disposal.

27. Accordingly, appeal is allowed. Judgment and order of conviction passed by the Court below is hereby set aside. Matter is remanded back to the

trial Court to give opportunity to both the sides whether they want to recall the witnesses for the purpose of further cross-examination and also an

opportunity be given to both sides, if they want to lead further evidence in addition of charges and then to dispose of the matter afresh in accordance

with law.

28. As the matter is oldest one, the learned Sessions Judge has to take up the matter on priority basis and to dispose of the same as early as possible

but not later than eight months from the date of receipt of copy of this order. Intimate the concerned trial Court accordingly.

29. High Court Registry is directed to send the original records and the order of this Court to the concerned trial Court immediately.