

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

Crl.A.No.554 of 2006

JUDGMENT:

This Criminal Appeal has been filed under Section 374 (2) Cr.P.C. challenging the judgment dt.28-03-2006 in Spl.C.C.No.58 of 2003 of the I Additional Sessions Judge, Mahabubnagar, convicting the appellant of the offences under Sections 39 and 44 (c) of the Indian Electricity Act, 1910 (for brevity 'the Act').

2. The case of the prosecution is that the accused is an inhabitant of Peddamandadi village and Mandal having a flour mill and rice mill with an electricity connection bearing Service Connection No.352 Category III.

3. P.W.1, who was the then Assistant Divisional Manager, DEPE-II, APCPDCL, Ananthapur District, visited the flour mill and rice mill premises of the appellant on 28-03-2001 at 1015 hours along with L.Ws.2 and 3 and found that the meter glass was broken and the meter disk was stuck up intentionally.

4. According to the prosecution, at the time of the inspection, the brother of the appellant by name one Md. Shafi was present at the time of the inspection by P.W.1 and others. Alleging that the appellant had indulged in pilferage of energy, the meter was preserved and subjected to MRT test. P.W.1 assessed the loss sustained by the AP Transco on account of the pilferage to be Rs.1,58,023/-. A complaint was lodged on 03-04-2001 at 1215 hours with P.W.6 requesting P.W.6 to take legal action. A Crime No.172 of 2001 under the above provisions of the Act was registered.

5. During investigation, P.W.6 examined P.W.1, L.Ws.2 and 3

and recorded their statements in detail under Section 161 (3) Cr.P.C. He also visited the spot and got acquainted with the scene of the crime.

6. He thereafter filed charge sheet before the Judicial First Class Magistrate, Mahabubnagar alleging that the appellant with *mala fide* intention had broken the glass of the meter and made the disc of the meter stuck up ,thus not recording consumption; thereafter, the accused had indulged in pilferage of energy and the same was detected by P.W.1 during his inspection on 28-03-2001 at 1015 hours. It also stated that P.W.1 had provisionally assessed the loss sustained by the AP Transco due to pilferage to the tune of Rs.1,58,023/- and apart from this, the accused was also made to pay a sum of Rs.20,000/-as per the connected load of 10 H.P. It is also stated that P.W.2 conducted MRT test in the presence of L.Ws.5 and 6 and Md.Shafi, brother of the accused at MRT Lab in Mahaboobnagar on 11-04-2001 and since it was established that the accused had committed the offences punishable under the above provisions of law, the charge sheet was filed.

7. After the accused appeared before the Court, copies of documents were furnished to him as per law and after hearing the accused, the following charges were framed.

"Firstly:-

That you being the owner of a Flour mill at Peddamandadi village having S.C.No.352, Cat.III on 28-03-2001, at 10-15 a.m., were found pilfering power by tampering with the meter and thereby caused loss to a tune of Rs.1,58,023/- which is an offence punishable under Section 39 of I.E. Act and within the cognizance of this Court.

Secondly:-

That on the date, time and place mentioned in the charge No.1, you were found to have tampered with the seals of P.B.

box, disc of the meter was not rotating, the glass of the meter was broken and the glass missing and interfered with the function of the meter and thereby you have committed the offence punishable under Section 44 (c) of I.E. Act and within the cognizance of this Court.

8. The charges were read over and explained to him in Telugu but he pleaded not guilty and claimed to be tried.

9. To prove the said charges, the prosecution examined P.Ws.1 to 6 and marked Exs.P-1 to P-9.

10. After the closure of the prosecution evidence, the incriminating material therein was put to the accused under Section 313 Cr.P.C. The accused then took the defence that about one week prior to 28-03-2001, the meter glass was broken during the course of taking of a reading by a helper. He admitted that on 11-04-2001, his meter was tested in MRT Lab and the MRT Lab issued Ex.P-5 certificate with the discrepancy alleged by the prosecution. He also stated that he was paying electricity bills regularly.

11. By judgment dt.28-03-2006, the said Court convicted the accused for offences punishable under Sections 39 as well as 44 (c) of the Act. The Court below sentenced him to undergo simple imprisonment for one year and to pay fine of Rs.5,000/- in respect of the charge under Section 44 (c) of the Act and also convicted and sentenced him to undergo simple imprisonment for one year and to pay fine of Rs.2,000/- for the offence under Section 39 of the Act and directed that both sentences should run concurrently.

12. Challenging the same, the accused preferred this Criminal Appeal.

13. The learned counsel for the appellant contended

firstly that Section 39 of the Act, which deals with theft of energy, requires an element of dishonesty in the consumption or use of energy by consumer, and that when the charge was framed by the Court below, the element of dishonesty was not mentioned in the charge. Therefore, the Court below could not have convicted the accused under Section 39 (c). He relied upon the decisions in

Ramesh Chander and others Vs. State of Delhi and another^[1]

and also **In re M.Gangadhariah**^[2]. He further contended that the burden of proof always rests on the prosecution to prove the charges alleged and that since the prosecution had not examined Md. Shafi alleged to be the brother of the accused who was said to be present at the time of inspection by P.W.1 and also at the time of testing of the meter in the MRT lab, adverse inference should have been drawn by the Court below against the prosecution under Section 114 (g) of the Indian Evidence Act, 1872. He cited **Sivagallu Sailu Vs. State, through Station House Officer, Kothur Police Station, Mahaboobnagar District, rep. by Public**

Prosecutor^[3] in support of this submission. Lastly he contended that in a situation where an accused was jointly tried for offences under Sections 39 and 44 of the Act and the accused is acquitted under Section 38 but convicted under Section 44, bar of limitation for taking cognizance under that section arises because of Section 468 Cr.P.C. and therefore, the accused is entitled to be acquitted for offence under Section 44 of the Act also. He placed reliance on

Prabhakaran Vs. State of Kerala^[4].

14. The learned Public Prosecutor on the other hand contended that the fact that the charge was not properly framed under Section 39 of the Act was not raised before the Court below by the accused and even in his Section 313 Cr.P.C. examination

and no failure of justice has in fact been occasioned for failure in mentioning the words 'dishonestly' in the first charge framed by the Court below. He further contended that Md. Shafi, who was present according to the prosecution at the time of the detection of the offence by P.W.1, is the brother of the accused; that the accused in his Section 313 Cr.P.C. examination had not denied that the said Md. Shafi was not his brother; therefore in view of the relationship between the said Md. Shafi and the accused, the accused ought to have examined the said Md. Shafi in his defence; and having failed to do so, the accused was rightly convicted by the Court below. He further submitted that the decisions cited by the learned counsel for the appellant are not at all applicable to the facts of the case and are clearly distinguishable.

15. Section 39 of the Act states as follows:

"Section 39. Theft of energy:

Whoever dishonestly abstracts, consumes or uses any energy shall be punishable with imprisonment for a term which may extend to three years, or with fine which shall not be less than one thousand rupees, or with both: and if it is proved that any artificial means or means not authorized by the licensee exist for the abstraction, consumption or use of energy by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of energy has been dishonestly caused by such consumer.

16. Section 44 of the Act states as follows:

"Section 44 - Penalty for interference with meters or

licensee's works and for improper use of energy:

Whoever-

(a) connects any meter referred to in section 26, sub-section (1), or any meter, indicator or apparatus referred to in section 26, sub-section (7), with any electric supply-line through which energy is supplied by a licensee, or disconnects the same from any such electric supply-line¹

[***];or

² [(aa) unauthorisedly re-connects any meter referred to in sub-section (1) of section 26, or any meter, indicator or apparatus referred to in sub-section (7) of section 26, with any electric supply-line or other works, being the property of the licensee, through which energy may be supplied, when the said electric supply line or other works has or have been cut or disconnected under sub-section (1) of section 24; or]

(b) lays, or causes to be laid, or connects up any works for the purpose of communicating with any other works belonging to a licensee ³ [***];or

(c) maliciously injures any meter referred to in section 26, sub-section (1), or any meter, indicator or apparatus referred to in section 26, sub-section (7), or willfully or fraudulently alters the index of any such meter, indicator or apparatus, or prevents any such meter, indicator or apparatus from duly registering; or

(d) improperly uses the energy of a licensee,

⁴ [shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees, or with both], and, in the case of a continuing offence, with a daily fine which may extend to ⁵ [fifty] rupees; and ² [if it is proved that any artificial means exist] for making such connection as is referred to in clause (a) ² [or such re-connection as is referred to in clause (aa),] or such communication as is referred to in clause (b), or for causing such alteration or prevention as is referred to in clause (c), or for facilitating such improper use as is referred to in clause (d), ⁶ [and that] the meter, indicator or apparatus is under the custody or control of the consumer, whether it is his property or not, ⁷ [it shall be presumed, until the contrary is proved] ⁴ [that such connection, reconnection, communication,] alteration, prevention or improper use, as the case may be, has been knowingly and willfully caused by such consumer.”

17. It is no doubt true that in order to make out a case that the accused had committed an offence under Section 39 of the Act, the element of dishonesty in the consumption, use or abstraction of energy by the accused should be proved. A reading of the first charge mentioned above does not disclose that the

word 'dishonestly' was mentioned specifically therein.

18. In **Ramesh Chander** (1 supra), quoted by the learned counsel for the appellant, the Delhi High Court has taken the view that the charge only speaks of discovery of tampered seals of electric meters on the inspection of petitioner's factory therein and the mere existence of the tampered meter is not enough to attract the provisions of Section 39 of the Act. It held there is no presumption of dishonest abstraction, consumption or use of electric energy on discovery of tampered meters and presumption under Section 39 of the Act would arise only if artificial means were employed to abstract, consume or use energy. The Delhi High Court held that the charge in that case did not even say that the abstraction was dishonest and the learned counsel for the State was not able to point out any circumstances coupled with the tampered seals indicating dishonest intention of the petitioners as contemplated by Section 39 of the Act; so, no *prima facie* case was made out against the petitioners under Sections 39 and 44 of the Act; and therefore, the charge framed was liable to be quashed.

19. In **In re M.Gangadhariah** (2 supra) cited by the learned counsel for the appellant also, the Mysore High Court has held that for an offence of forgery to be made out within the meaning of Section 463 IPC, there has to be dishonest and fraudulent preparation of false document or part thereof and it was therefore necessary for the charge to state that the document in question was a false document prepared dishonestly or fraudulently. It held that the charge should have further stated if the prosecution case was that the document was prepared dishonestly, whether the intention with which the document was prepared, was to cause wrongful gain to some one or wrongful loss

to another.

20. However the said decisions in my opinion did not consider Section 464 and 465 Cr.P.C. which state as follows:

“Section 464 - Effect of omission to frame, or absence of, or error in, charge:

(1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may—

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

21. Section 465 Cr.P.C. states as follows:

“Section 465 - Finding or sentence when reversible by reason of error, omission or irregularity:

(1) Subject to the provisions hereinbefore contained, on finding sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could

and should have been raised at an earlier stage in the proceedings.”

22. The Supreme Court in **State of A.P. Vs. Thakkidiram Reddy and others**^[5], interpreted the above provisions of law and following its own judgment in **Willie (William) Slaney Vs. The State of Madhya Pradesh**^[6] held that in judging the question of prejudice, as of guilt, the Courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. In the said case, a contention was raised that charges were not framed against the accused persons in accordance with Section 211 of the Cr.P.C., in that, in the charge framed under Section 148 IPC though it was alleged that the accused were the members of an unlawful assembly it was not mentioned what was its common object. It was also contended that a charge under Section 302 IPC simpliciter was framed against all the accused persons and not with the aid of Section 149 IPC for which they were convicted by the trial Court. It was contended that an accused is entitled to precisely know the exact nature of the charge brought against him and unless he has this knowledge, he will be prejudiced in his defence, particularly in a case where he is sought to be prosecuted for acts not committed by himself but by others with whom he is in company. The Court held that although in that case, the charges suffered from the infirmities pointed out by the learned counsel for the accused, the accused were not in any way prejudiced due to the errors or omissions in the charges. It further pointed out that this point was

not agitated in the trial Court and also from the fact that the material prosecution witnesses who narrated the entire incident were cross examined at length from all possible angles and the suggestions that were put forward to the eye witnesses also showed that the accused were not in any way prejudiced in their defence. It was also stated that in the examination of the accused under Section 313 Cr.P.C., the accused were specifically told of their having committed offences (besides others) under Section 148 and 302/149 IPC and therefore the conviction of the accused cannot be set aside on that ground.

23. In my considered opinion, the said judgment of the Supreme Court clearly covers the case on hand. Admittedly, in the trial Court no contention was raised that the omission of the word 'dishonestly' in the first charge framed under Section 39 of the Act was bad in law and had caused prejudice to the accused. Secondly, it is not disputed that in the examination of the accused under Section 313 Cr.P.C., the accused was told he is alleged to have committed an offence under Section 39 and Section 44 (c) of the Act. Apart from this, the material prosecution witnesses in particular, P.Ws.1 to 3, 5 and 6 were cross examined at length from all possible angles and suggestions were given to them that the discrepancies found by P.W.1 were created due to mishandling of the meter by the lineman of the AP Transco during the course of regular inspection and that the accused was innocent.

24. In this view of the matter and having regard to the provisions of Sections 464 and 465 Cr.P.C., I am of the opinion that the accused has had a fair trial; that he knew he was being tried for said offences; main facts sought to be established against him were explained to him fairly and clearly; and there was given a full and fair chance to defend himself. In my opinion, the accused

was not in any way prejudiced due to the omission of the use of the word 'dishonestly' in the first charge.

25. In view of the judgment of the Supreme Court in **Thakkidiram Reddy** (5 supra), in my opinion, the judgments in **Ramesh Chander** (1 supra) and **In re M.Gangadhariah** (2 supra) which are only for a persuasive in nature, cannot be applied and the accused cannot be given any benefit of the omission to use the word 'dishonestly' in the first charge.

26. Coming to the second contention of the accused about non-examination of Md.Shafi and the need to draw adverse inference against the prosecution is concerned, P.W.1 had stated categorically that the said individual claimed to be the brother of the accused and was present at the time of inspection; that his statement Ex.P-2 was obtained and his signature was taken on the statement. P.W.2 also stated that the Service Connection of the accused was brought to the MRT lab by P.W.1's subordinates and in the presence of Md.Shafi, the brother of the accused, the meter was examined and it was found that the glass of the meter was already broken and on opening, some pieces of glass were found lying inside the meter box. He stated that he had issued Ex.P-5 report and the said Md. Shafi attested the same. No suggestion was given to P.Ws.1 and 2 that the said Md. Shafi was not the brother of the accused or that he was not present at the time of inspection by P.W.1 or the testing of the meter by P.W.2. Even in Section 313 Cr.P.C. examination of the accused, no stand was taken by the accused that the said Md. Shafi had nothing to do with the accused and was not his relative.

27. In the normal course of human conduct, it is unusual for a relative of an accused to support the prosecution. In this view of the matter, it was incumbent on the accused to examine his

brother Md. Shafi to contradict the prosecution evidence, not only about his presence at the time of the inspection by P.W.1 but also at the time of testing of the meter by P.W.2. Since the accused has withheld the evidence of Md.Shafi, adverse inference is to be drawn against the accused that if his brother had been examined, the evidence of his brother would not have been in his favour.

28. P.W.1 had categorically stated that at the time of inspection, he had found that the glass of the meter was broken and the meter disc was stuck up intentionally; since pilferage of energy on account of this was a deliberate act of the accused, the meter was preserved and was subjected to a MRT test; except suggesting that the discrepancy as found by P.W.1 was due to mishandling of the meter by the lineman/helper, an employee by AP Transco, during the course of regular inspection, he was not cross examined on any other aspect. The suggestions given to this witness was that the accused had nothing to do with the mill premises and he was falsely implicated; this is belied by the statement in the Section 313 Cr.P.C. examination by the accused that one week prior to 28-03-2001, meter glass was broken during the course of taking reading by a helper. Nowhere had the accused proved that he had nothing to do with the mill premises and in fact, P.W.3 stated that the Service Connection No.352 Category III of Paddamandadi village was released on 31-01-1989 in favour of the accused who is a resident of that village. Ex.P-6 Service Release Certificate was also issued by P.W.3 in that regard.

29. P.W.4 is the Panchayat Secretary of the said panchayat who issued Ex.P-7 Certificate stating that the accused belongs to the village of Peddamandadi and he is running the flour mill for the last 20 years. This witness was not even cross

examined by the accused.

30. The accused had not even given the name of the helper said to have been employed by the AP Transco, who was responsible for breaking the meter glass. The accused had also not examined any such person.

31. Although the defence set up by the accused was that the meter glass was broken one week prior to the inspection and the same was complained to the electricity office, the accused had not examined his brother to explain when and where the alleged report had been lodged, what was the reaction of the officials and what was the effort to see that the meter was rectified by the department. In the absence of any explanation from the accused, it cannot be accepted that any complaint had been lodged by the brother of the accused Md. Shafi about the damage to the meter prior to 28-03-2001.

32. Therefore, in the absence of any proof for this defence, it has to be presumed that the discrepancy in the Service Meter was known to the accused for a long time and the accused had not brought it to the notice of the department officials.

33. The service meter was tested in the MRT Lab in the presence of the brother of the accused and the damage to the meter was noted. So, the version of the prosecution that the meter glass was broken intentionally so as to make the meter disc to stop rotating and not recording the actual consumption, has to be accepted as true. Therefore, I am of the opinion that the Court below has correctly appreciated the evidence on record and convicted the accused.

34. Having regard to the fact that the accused has been convicted both under Sections 34 and 44 of the Act, the decision in

Prabhakaran (4 supra) cited by the appellant cannot be applied to the facts of the case.

35. For all these reasons, the Criminal Appeal fails and is accordingly dismissed.

36. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S. RAMACHANDRA RAO

Date : 30-04-2015

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[\[1\]](#) 1998 Cr.L.J. 579

[\[2\]](#) AIR 1967 MYSORE 86

[\[3\]](#) 2013 (1) ALT (Cr.) 292 (A.P.) (DB)

[\[4\]](#) 1986 Cr.L.J. 1411

[\[5\]](#) AIR 1998 S.C. 2702

[\[6\]](#) AIR 1956 S.C. 116