

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE SRI JUSTICE T. AMARNATH GOUD

CRIMINAL APPEAL No.417 OF 2011

ORDER :

%Dated 08.12.2017

Dugudu China Tirupathi, S/ o. China Chalamaiah,
Aged about 41 years, R/ o. Ramasamudram Village,
Tripuranthakam Mandal, Prakasam District

..... APPELLANT

VERSUS

\$ The State of Andhra Pradesh,
Rep. by its Public Prosecutor,
High Court of A.P., Hyderabad

..... RESPONDENT

! Counsel for Appellant : Sri Mettu Govardhan Reddy

^ Counsel for Respondents : P.P. for the State of A.P.

< GIST :

> HEAD NOTE :

? Cases referred :

1. (2000) 4 SCC 41
2. (2009) 7 SCC 104
3. Laws (SC) 2010-7-78
4. 1999 SCC (Cr.) 1319
5. (1984) 4 SCC 116

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

CRIMINAL APPEAL No.417 of 2011

Between:

Dugudu China Tirupathi

..... APPELLANT

VERSUS

The State of Andhra Pradesh,
Rep. by its Public Prosecutor,
High Court of A.P., Hyderabad

.... RESPONDENT

JUDGMENT PRONOUNCED ON : 08.12.2017

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

HON' BLE SRI JUSTICE T. AMARNATH GOUD

1. Whether Reporters of Local : Yes/ No
newspapers may be allowed to see
the Judgment ?
2. Whether the copies of judgment may : Yes/ No
be marked to Law Reporters/ Journals
3. Whether Their Ladyship/ Lordship wish : Yes/ No
to see the fair copy of judgment

C. PRAVEEN KUMAR, J

T. AMARNATH GOUD, J

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE SRI JUSTICE T. AMARNATH GOUD

CRIMINAL APPEAL No.417 OF 2011

JUDGMENT : (per Hon' ble Sri Justice C.Praveen Kumar)

1) The appellant herein, who was sole accused in S.C.No.636 of 2010, tried for an offence punishable under Section 302 IPC, for causing death of his wife by name Digudu Galamma (hereinafter referred to as "the deceased") on 21.01.2006 at 2.00 hours. Vide judgment, dated 17.02.2010, the VI Additional Sessions Judge (Fast Track Court), Markapur, convicted him for the offence punishable under Section 302 IPC and sentenced to suffer "imprisonment for life" and to pay fine of Rs.1,000/- in default to suffer simple imprisonment for a period of four months.

2) The case of the prosecution, as unveiled from the evidence of the prosecution witnesses, is as under:

i) Accused is the husband of the deceased. PWs.2 and 3 are parents of the deceased. The marriage of the deceased and accused took place about 17 years prior to the date of incident. Out of wedlock, they blessed with four children. PW.3 in his evidence deposed that the behaviour of the accused was not good and, on one occasion, the accused also broke the hand of the deceased. On receipt of the information, about the death of the deceased, PWs.2 and 3 proceeded to the house of the accused.

According to PW.3, the sister of the accused informed them about the incident. PW.4 is the son of the deceased and accused. He deposed that, on the date of incident, on hearing the cries of his mother, he woke up and saw the accused running away leaving the crow bar. Further, the evidence of PW.8 shows that about five years prior to giving evidence, in the early hours, he heard a galata near the house of accused, which is opposite to his house. Then himself, along with other villagers, went to the house of the deceased and found her dead body on a cot with bleeding injuries. According to him, the accused killed the deceased on the previous night. It is said that about 20 days prior to the date of occurrence, the accused returned to the village and was staying along with the deceased in the house. His evidence also shows that during his stay, the accused used to work in agricultural fields. The accused used to abuse and beat the family members in an intoxicated condition. He also states that he has not seen the accused leaving the village in the night of occurrence. At that stage, the witness was treated as hostile by the prosecution.

ii) On 21.02.2006, at about 11.30 hours, PW.1, who is the Panchayat Secretary of the Village, lodged a report, Ex.P1, before the Police. Basing on the said report, P.Sanjeeva Reddy (HC 896), registered a case in Crime No.7 of 2006 for the offence punishable under Section 302 IPC. While PW.11, the Inspector of Police, was in the police station, the said P.Sanjeeva Reddy, HC 896, handed over a copy of the first information report, which is marked as Ex.P8. PW.11 examined the informant, PW1, and recorded his

statement. He, then, proceeded to the scene of offence, secured PW.1 and another, and prepared a sketch of the scene of offence, which is marked as Ex.P9. At the scene of offence, blood stained crow bar, blood stained earth, control earth were seized in the presence of mediators. He also got photographed the scene of offence. Later, he conducted inquest over the dead body of the deceased, in the presence of PW.7 and others. Ex.P2 is the inquest report. During inquest, he examined PWs.2,3,4 and 6 and also seized the cloths of the deceased. Later, he sent the dead body to Area Hospital, Markapur, for postmortem examination. PW.9, the Civil Assistant Surgeon, Area Hospital, Markapur, conducted autopsy over the dead body of the deceased and issued Ex.P5, the postmortem certificate. According to the Doctor, the cause of death was “hemorrhage and shock due to injury to major blood vessels and injury to vital organ brain.”

iv) As the police could not arrest the accused, a charge sheet came to be filed before the Court of the Additional Judicial Magistrate of First Class, Markapur, showing the accused as absconding, which was taken on file as P.R.C.No.17 of 2008. Since the accused was absconding for a long time, the Magistrate followed the procedure under Sections 82 and 83 Cr.P.C.; recorded the statements of the witnesses, under Section 299 Cr.P.C., and, thereafter, treated the case as a Long Pending Case. After the arrest of the accused, the case was re-numbered and then the matter was committed to the Court of Sessions, wherein it came to be numbered as S.C.No.636 of 2010.

3) On appearance, charge under Section 302 IPC came to be framed, read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.

4) In support of its case, the prosecution examined PWs.1 to 11 and got marked Exs.P1 to P10 and M.Os.1 to 9. The chief examination of the witnesses recorded by the Magistrate, under Section 299 Cr.P.C., was treated as evidence in chief in Sessions Case and the said witnesses were subjected to cross-examination.

5) After considering the entire evidence, including oral and documentary, available on record, the trial Court convicted and sentenced the accused, in the manner referred to above. Challenging the same, the present appeal is filed.

6) One of the main arguments advanced by the learned counsel for the appellant is that the entire trial gets vitiated as the evidence in chief of the witnesses recorded by the Magistrate came to be used as evidence in chief, in the Sessions Case, after committal though the said witnesses were available.

7) In order to appreciate the same, it would be useful to refer to Section 299 Cr.P.C., which is as under:

"299. Record of evidence in absence of accused."

(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try ², or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead

or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.”

8) A reading of Section 299 Cr.P.C., would show that even in cases triable by the Court of Sessions, if the accused is found to be absconding, the Magistrate can record the statements of the said witnesses on oath and then treat the case as a Long Pending Case. After the arrest of the accused, the said case shall be re-opened and would be committed to the Court of Sessions, if it is triable by a Court of Sessions. Section 299 Cr.P.C., makes it very clear that the statement on oath recorded by a Magistrate has to be treated as evidence in chief, in the Sessions Case, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

9) When interpretation of Section 299 Cr.P.C., came up for consideration, in *Nirmal Singh v. State of Haryana*¹, the Apex Court held that Section 299 Cr.P.C., consists of two parts. The first part speaks of the circumstances under which the witnesses produced by the prosecution could be examined in the absence of the accused and the second part speaks of the circumstances when such deposition can be given in evidence against the

¹ (2000) 4 SCC 41

accused in any enquiry or trial for the offence with which he is charged. The procedure contemplated u/ s.299 Cr.P.C., was held to be an exception to the principle embodied u/s.33 of the Evidence Act, inasmuch as u/ s.33, the evidence of a witness, which a party has no right or opportunity to cross-examine, is not legally admissible. Being an exception, it is necessary, therefore, that all the conditions prescribed must be strictly complied with. In other words, before recording the statement of a witness produced by the prosecution, the court must be satisfied that accused has absconded or there is no immediate prospect of arresting him, as provided under first part of Section 299 (1) of Cr.P.C. When accused is arrested and put up for trial, if any such deposition of any witness is intended to be used as evidence against the accused, in any trial, then the court must be satisfied that either the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense, or inconvenience, which would be unreasonable.

10) Similar such view came to be expressed by the Apex Court in *Jayendra Vishnu Thakur vs. State of Maharashtra*². From the judgment of the Apex Court (1 supra), it is clear that the procedure contemplated U/ s.299 Cr.P.C., is mandatory in nature and the same would vitiate the entire proceedings, if violated.

² (2009) 7 SCC 104

11) In the instant case, the witnesses, who were examined by the Magistrate, under Section 299 Cr.P.C., were summoned and subjected to cross-examination in the Sessions Court. PWs.1 to 7, who were examined, under Section 299 Cr.P.C., by the Magistrate, were summoned and cross-examined. Therefore, they were alive, available in India and capable of giving evidence as on the date of their cross-examination. Such being the position, we feel that the Court ought not to have relied upon the statements of the witnesses, recorded by a Magistrate, under Section 299 of Cr.P.C., and subject them to cross-examination. Hence, the entire procedure, adopted by the trial Court, is contrary to law and the same would vitiate the entire trial. .

12) Further, while examining the accused under Section 228 Cr.P.C., the accused pleaded not guilty and claimed to be tried. However, during the course of 313 Cr.P.C., examination, the accused is said to have pleaded guilty.

13) Learned Public Prosecutor would submit that once the accused has admitted his guilt in his examination under Section 313 Cr.P.C., no further evidence is necessary to prove or disprove the merits of the case and that the admission of guilt in Section 313 Cr.P.C. examination is sufficient to connect him with the crime.

14) Dealing with the scope and ambit of Section 313 Cr.P.C.

statement, the Apex Court, in *Mannu Sao vs. State of Bihar*³

held as under:

“8. Let us examine the essential features of this [Section 313](#) Cr.P.C. and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Code. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and besides ensuring the compliance thereof the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or in the alternative to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence. The statement of the accused can be used to test the veracity of the exculpatory of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313 (4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put as evidence against the accused in any other enquiry or trial for any other offence for which such answers may tempt to show he has committed. In other words, the use is permissible as per the provisions of the

³ Laws (SC) 2010-7-78

Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Code as it cannot be regarded as a substantive piece of evidence.”

15) From the judgment (3 supra), it is clear that the statement of the accused made under Section 313 Cr.P.C., cannot be read in isolation. The Court may rely on a portion of such statement and find him guilty in consideration of the other evidence adduced against him by the prosecution.

16) It is also to be noted here that the accused can also keep silent. It is not necessary that he has to give some explanations to every question put to him. As held by the Apex Court in *Mannu Sao vs. State of Bihar* (3 supra), the statement of the accused cannot be regarded as a substantive piece of evidence, and that the statement of accused can be used to test the veracity of the exculpatory of the admission, if any, made by the accused.

17) As seen from the record, what has been put to the accused in his 313 Cr.P.C., examination, is the statements of PWs.1 to 7, recorded by a Magistrate, under Section 299 Cr.P.C., before framing of the charge and the cross-examination was done later. The said procedure could have been adopted, provided the said witnesses were not available or incapable of giving evidence. That is not so in the case on hand.

18) What has been done in the instant case is that the statements of the witnesses were recorded under Section 299 Cr.P.C., and after the apprehension of the accused, the case was committed to the Court of Sessions, charges came to be framed against the accused and then the Court proceeded with the trial. During the course of trial, the statements recorded by the Magistrate under Section 299 Cr.P.C., before committal of the case, came to be used as evidence in chief in Sessions Case, though the said witnesses were available and then the said witnesses were subjected to cross-examination.

19) In other words, what happened is that charge came to be framed after recording the evidence in chief of the witnesses, which amounts to following a procedure which is not contemplated under the Criminal Procedure Code. Further, what was put to accused under Section 313 Cr.P.C., is the statements on oath, recorded by the Magistrate, under Section 299 Cr.P.C., though the witnesses were available and the case is triable by a Court of Sessions, which procedure is against the spirit and purport of Sections 299 and 313 Cr.P.C.

20) What is required to put to the accused in the examination under Section 313 Cr.P.C., is the incriminating material that appears against the accused during the course of the trial. Hence, we are of the view that the entire procedure adopted by the trial court, in convicting the accused, basing on the evidence of P.Ws. 1 to 6, is illegal, improper and incorrect.

21) At this stage, the learned Public Prosecutor would contend that since it is only a technical mistake, the matter may be remanded back to the trial Court for fresh consideration.

22) In *Rautu Bodra and another vs. State of Bihar*⁴ the Apex Court was dealing with a case where the incriminating material appearing against the accused was not put to him under Section 313 Cr.P.C., examination. In the said case, the trial Court failed to put the questions to the accused relating to the evidence of PW.6, who was a crucial witness. The Apex Court, while referring to the judgment of its own in *Sharad Birdhichand Sarda v. State of Maharashtra*⁵, held that the circumstances, which are not put to the accused, in his examination, under Section 313 Cr.P.C., requires to be excluded from consideration because the accused did not have any chance to explain the same. One other argument advanced before the Apex Court was to remit the matter back to trial court for re-conducting the 313 Cr.P.C., examination relating to the evidence of P.W.6. Having regard to the fact that the incident took place more than 15 years prior and since the appellant therein has already served more than four years of imprisonment, the Court felt that it was not justified in resorting to such a course of action, at that distant point of time. Left with no other option, the Apex Court allowed the appeal.

23) In the case on hand also, the incident in question occurred in the year 2006 and the judgment of the trial Court was in the

⁴ 1999 SCC (CrI.) 1319

⁵ (1984) 4 SCC 116

year 2010. Since then the accused is in jail, meaning thereby the accused is in jail since last seven years.

24) Having regard to the judgment of the Apex Court in *Rautu Bodra and another vs. State of Bihar (4 supra)* and since the appellant has served nearly seven years of imprisonment, we are also of the opinion that it is not a fit case to be remanded for fresh consideration.

25) Accordingly, the appeal is allowed and the conviction and sentence recorded against the appellant in the judgment, dated 17.02.2010 in S.C.No.636 of 2010 on the file of the VI Additional Sessions Judge (FTC), Markapur, for the offence punishable under Section 302 IPC are set aside. Consequently, the appellant/accused shall be set at liberty forthwith, if he is not required in any other case.

26) Consequently, miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

JUSTICE T. AMARNATH GOUD

08.12.2017

Note: L.R. copy to be marked.

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