A AHMED BIN SALEM

v

STATE OF ANDHRA PRADESH

APRIL 13, 1999

B [G.B. PATTANAIK AND M.B. SHAH, JJ.]

Penal Codes, 1860/Code of Criminal Procedures, 1973—Sections 302 and 307/161 Criminal Trial—Appreciation of evidence—Contradictions and improvement in the evidence during the trial from the one stated by the C *witnesses to the police under Section 161 Cr.PC—Murder of two persons by hurling bombs—Appellant's name appeared neither in the FIR nor in the statements recorded by the police—However, appellant's name was included during the course of trial—Material contradictions and improvements in the statement recorded by the witnesses during the recording of evidence in* D *court—Absence of proper test identification parade—Delayed examination of witnesses—Held, prosecution failed to prove the charge of the appellant beyond reasonable doubt and entitled to be acquitted—Explosive Substances Act, 1908, Sections 3 and 5.*

Practice and Procedure—Re-appreciation of evidence—When E *permissible.*

The case of the prosecution was that accused persons came on a scooter and hurled some bombs at the shop of PW1 in which PW1 and two other persons sustained injuries. Later on the two persons D1 and D2 succumbed to the injuries. Appellant's name was not there in the FIR nor F **given by the witnesses in the statements given to the police under Section 161 CrPC. However, the name of the appellant was included during the trial as main accused who threw bombs towards the deceased. In this case there was delayed test identification parade conducted after two years in course of trial. There was delayed recording of evidence of witnesses by the police.** G **There were material contradictions in the statement given by the witnesses PW1, PW6 and PW7 under Sections 161 CrPC and the evidence in the court during the trial.**

The appellant and two others were convicted for an offence committed under Sections 307 and 302 IPC and Sections 3 and 5 of the Indian Explosive H **Substances Act. However, one accused died during the trial and therefore the**

proceeding stood abated against him. On appeal the High Court affirmed the conviction under Section 302/307 IPC and set aside the charges under Sections 3 and 5 of the Explosive Substances Act with respect to the present appellant and the other accused. Hence this appeal. During the pendency of the present appeal the other accused persons also died and hence the proceedings stood abated against him.

Allowing the appeal, this Court

HELD :1.1. Ordinarily this Court does not examine the evidence and re-appreciate the same when two courts of fact have already relied upon it, but if there appear some glaring features in the evidence, which can be seen by a mere perusal, then this Court will be failing in its duty if it does not examine the same to test their reliability on which evidence the accused persons are being convicted of a charge of murder and sentenced to imprisonment for life. [614-G]

1.2. If the evidence of PW1 is examined, whose statement has been recorded on the date of occurrence, it would be highly unsafe to rely on his evidence. His evidence in court totally changed from his statement recorded under section 161 CrPC. When he was confronted with his earlier version made before the police he gave the explanation that his signature was taken on a document without the contents being known and, therefore, his so-called earlier version was not his statement. In his examination-in-chief, PW1 stated that he knew both the accused persons who were present in court but in cross examination he stated that the accused persons were totally strangers and, therefore he participated in the identification test that was conducted. When the contradictions made in his earlier statement to the police were confronted, he flatly denied to have made such statement to the police. Thus there is no hesitation to hold that he was a thoroughly unreliable witness and his testimony cannot be utilised by the prosecution for bringing home the charge against the appellant. Similarly there is material contradictions in the testimony given to the police under Section 161 CrPC and the evidence given in the court by the witnesses PW6 (a friend of PW1) and PW7 (who was working in the wine shop of PW1). [614-D; 615-C-D]

1.3. The prosecution has totally failed to establish charge against the appellant beyond reasonable doubt and he is entitled to be acquitted.[617-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 587 of 1994.

A From the Judgment and Order dated 10.2.93 of the Andhra Pradesh High Court in Crl.A. No. 435 of 1992.

U.R. Lalit and K. Maruthi Rao, (Mrs. K. Radha) and Vimal Dave for the Appellant.

B Ms. Tanamika and Guntur Prabhakar for the Respondent.

The Judgment of the Court was delivered by

PATTANAIK, J. The appellant and two others were tried by the Additional Metropolitan Sessions Judge, Hyderabad for the offences under C Sections 307 & 302 IPC and Sections 3 and 5 of the Indian Explosive Substances Act. Accused Mohammed Sardar died during the pendency of the trial and therefore, the criminal proceeding stood abated as against him. The appellant was convicted by the learned Sessions Judge under Section 302 IPC and was sentenced to imprisonment for life and also to pay a fine of Rs.5,000 , in default to suffer R.I. for two years. He was also sentenced to undergo D imprisonment for a period of 10 years and also to pay a fine of Rs.5000, in default to suffer R.I. for two years for the offence under Section 307 IPC and under Section 3 of the Explosive Substances Act, he was sentenced to undergo R.I. for ten years and also to pay a fine of Rs.5,000, in default to suffer R.I. for three years and under Section 5 of the Explosive Substances E Act, was sentenced to R.I. for five years and to pay a fine of Rs.5000, in default to suffer R.I. for two years. The sentences were ordered to run concurrently. The other accused Mohd. Burhanuddin was convicted under Section 302/34 IPC and was sentenced to imprisonment for life and to pay a fine of Rs.1000, in default to suffer R.I. for one year and for the offence under Section 307/34, he was sentenced to undergo imprisonment for a period of F five years and also to pay a fine of Rs.2000, in default to suffer R.I. for one year and for the offence under Section 3 of the Explosive Substances Act read with Section 34 IPC, he was sentenced to imprisonment for a period of 10 years and also to pay a fine of Rs. 2000, in default to suffer R.I. for two years and for the offence under Section 5 of the Explosive Substances Act read with G Sec.34 IPC, he was sentenced to undergo imprisonment for a period of five years and also to pay a fine of Rs. 1000, in default to suffer R.I. for one year. Sentences were ordered to run concurrently. On appeal, the High Court of Andhra Pradesh came to hold that the prosecution has failed to establish the charges under Sections 3 and 5 of the Explosive Substances Act and accordingly set aside the conviction and sentences thereunder, but affirmed H the conviction of the appellant under Section 302 IPC and Section 307 IPC

as well as the sentences passed thereunder and also the conviction and sentences against the accused Md.Burhanuddin under Section 302/34 and Section 307/34. The appellant preferred the appeal in this court which was registered as Crl.Appeal No.587/94 and the co-accused preferred the appeal which was registered as Crl.Appeal No. 375/93. Crl.Appeal No.375/93 stood abated as the appellant therein died during the pendency of this appeal and hence we are concerned with the present appellant alone.

Prosecution case in nutshell is that on 6.7.90 at about 10.15 AM, the three accused persons came on a scooter which was being driven by accused Burhanuddin and the present appellant hurled five bombs, causing injury to PW1 as well as deceased Gopal Sharma and deceased Kishan Rao Kandekar and on account of such injuries received by them, Gopal Sharma died in the hospital on 10.7.90 at 9 A.M. while Kishan Rao Kandekar died on the same day at 6.50 A.M. in Osmania General Hospital. The prosecution alleged that there exist civil disputes between brother of the present appellant and PW1 and others in respect of a land in Piagah colony and on account of the said dispute one Sabir Bin Salam had been murdered on 2.3.90 and the police had registered Crime No. 48/90 on that score against PWs 1,2, 6 and 8. After PW 1 was released on bail in the aforesaid case on 4.5.90 and was running his wine shop at Muslimgunj Bridge on partnership with one Ranjit Singh and was also doing real estate business at a place opposite to the wine shop, on the relevant date the accused persons came on a scooter and after getting down from the scooter accused No. 1 (the present appellant) who was the pillion rider, took out from a box some bombs and hurled at the office of PW1 which exploded and there was lot of smoke and it is in that explosion, not only PW1 himself was injured but the two persons as already stated died and accused persons went away with the scooter. The two deceased persons were brought to the Osmania General Hospital in an unconscious condition and PW1 himself was admitted to the hospital. The S.I. of Police PW25 came to know of the incident from some passerby and then he came to the hospital where he recorded the statement of PW1 Exhibit-P2. PW 26, another Sub-Inspector of Police also had received a prior intimation Exhibit P2 and had registered the crime case and treated the same to be F.I.R. and took up investigation. On completion of investigation, the police submitted the charge-sheet and on being committed, the accused persons stood their trial. The prosecution examined as many as 28 witnesses and exhibited a large number of documents. The defence plea was one of denial. The learned Sessions Judge and the High Court relied upon the evidence of the three eye witnesses PWs 1, 6 and 7 and convicted the appellant of the charge under Sections 302

A and 307 as already stated on the basis of the aforesaid evidence. It may be noted that the appellant was not in the picture and his name also did not find place in the F.I.R. and it is only after the statement of PW6 was recorded on 30.7.90, the appellant was brought into the arena of accused persons.

B Mr. U.R.Lalit, the learned Senior Counsel, appearing for the appellant submitted that the prosecution version as unfolded in the F.I.R. was to the effect that one Sayeed, who was the pillion rider, got down from the scooter, took out a bomb and threw it towards PW1 and then four other bombs were thrown by him. This earliest version is now being changed in course of evidence during trial and Sayeed is being replaced by appellant and it is being C stated that the appellant threw the bomb. According to Mr. Lalit, this story as unfolded through prosecution witnesses in court cannot be sustained in view of the positive statement of Raghunandan PW1 that it was one Sayeed, who got down from the scooter, took the bomb and threw it. According to Mr. Lalit, the eye witnesses admittedly being enemical towards the accused persons, their evidence need a stricter scrutiny before being accepted by the D court and on such a scrutiny being made, no court can rely upon their testimony in view of several material omissions from their earliest version recorded under Section 161 Cr.P.C. and several contradictions have brought out by way of confrontation and, therefore, the Sessions Judge and the High Court committed error in relying upon the evidence of the aforesaid witnesses. E It is to be noticed that though in Exhibit P2, Raghunandan had categorically stated that Sayeed was sitting as a pillion rider and then threw bombs but no charge-sheet was filed against Sayeed and instead charge-sheet was filed against the present appellant and two others who in the meantime have died.

F Learned Counsel appearing for the State of Andhra Pradesh, on the other hand contended that two courts having believed the evidence of the three eye witnesses, it would not be proper for this court to re-examine the same and, therefore the conviction of the appellant cannot be interfered with.

G It is true that ordinarily this court does not examine the evidence and re-appreciate the same when two courts of fact have already relied upon but if there appears some glaring features in the evidence, which can be seen by mere perusal, then the court will be failing in its duty if it does not examine the same to test their reliability on which evidence the accused persons are being convicted of a charge of murder and sentenced to imprisonment for life. Bearing in mind the aforesaid principle if we examine the evidence of PW1, H whose statement has been recorded on the date of occurrence, it appears that

it would be highly unsafe to rely on his evidence. At the outset it may be stated that while in his statement recorded on 6.7.90 he had unequivocally stated that on the scooter he could recognise Sayeed and his two brothers and it is Sayeed who was having a box in his hand and after getting down from the scooter took out a bomb and threw it and thereafter four other bombs were thrown, but in his evidence in court, the version is totally changed and he stated that only two persons were on the scooter namely the appellant and accused No. 3 and it was appellant No. 1 who was the pillion rider and it is he who brought out a bomb from a box and threw. When he was confronted with his earlier version made before the police he gave the explanation that his signature was taken on a document without the contents being known and, therefore his so-called earlier version is not his statement. In his examination-in-chief, while he stated that he knew both the accused persons those who were present in court but in cross examination he stated that the accused persons were totally stranger and, therefore he participated in the identification test that was conducted. When the contradictions made in his earlier statement to the police were confronted, he flatly denied to have made such statement to the police as contained in Exhibit P2. This being the evidence of the witness in court, we have no hesitation to hold that he is thoroughly unreliable witness and, therefore his testimony cannot be utilised by the prosecution for bringing home the charge against the appellant. Coming to the next witness PW6 who is stated to be a friend of PW1, it appears that he was examined by the police on 30th of July, though the occurrence is of 6th of July, 1990. There is no explanation for such delayed examination of this witness under Section 161 Cr.P.C. In such delayed examination by the police, the witness had categorically stated that three persons were going on the scooter, whereas in court he stated that the appellant and accused No. 3 were going on the scooter. In his statement under Section 161 Cr.P.C. he had stated that it is Sardar, who got down from the scooter and took out the bombs and threw it into the office of Raghunandan, whereas in court he stated that it is the appellant who threw the bombs after getting down from the scooter. A definite suggestion was given that Inspector Narasing Rao introduced himself after a month of the incident to counter the earlier murder case and to put pressure on accused No. 1 to compromise the case which of course the witness denied but in view of the material contradictions as pointed out earlier even with regard to the person who threw the bomb, we do not think it safe to rely on the evidence of this witness for establishing the charge against the

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A appellant that it is the appellant who threw the bomb to the shop of PW1. PW7, is yet another witness who in his evidence has stated that he was working in the wine shop of PW1 And when on the day of occurrence he heard some sound he found that one person was sitting on a scooter and the other person hurling 3 or 4 times some object towards office of PW1 And B those are objects of explosions and he pointed out towards the appellant to be the person who hurled the bombs and he supposed to have identified them in a test identification parade. But in his earliest statement to the police recorded under Section 161 Cr.P.C he had positively asserted that he knows all the brothers and if he really knew all the brothers then the fact that he C could not name any and the so-called test identification parade is of no consequence. Further in his earlier statement which was duly confronted to him, though he had stated that there were three accused persons who sped away but in court he changes the version and restricts it to accused No. 1 and accused No. 3. The so-called identification also is of a peculiar nature and D the witness in his evidence stated that the police asked him whether he could identify the persons who were on the scooter to which he replied in affirmative and then the two accused persons were shown for the purpose of identification and he identified them. We fail to understand as to how the so-called identification done in the aforesaid manner will assist the prosecution in any way and this cannot be held to be a test identification parade. In the aforesaid E premises, we feel it unsafe to rely upon the statement of the aforesaid eye witness PW7. Learned Counsel appearing for the State in course of his submission has urged that even PW3 can be held to be eye witness to the occurrence and it is he who identified the two accused persons in court when he was examined on 8.4.1992. He did not state in the evidence that he knew F the persons and the prosecution had not taken any steps to hold the test identification parade for getting the accused persons identified by this witness. The so-called identification of the accused persons by this witness after two years in course of trial is of no consequence and on such identification it cannot be said that the prosecution has been able to bring home the charge G against the accused. This witness also in his 161 Statement, unequivocally stated that the three persons came on a scooter and one got down and took out a box and pick up a bomb and threw it to the office of the PW1 which exploded loudly and it further stated that of the three persons who ran away one among whom was Sayeed but in court gave a totally different picture and H on being confronted with his earlier version makes a clean denial. In this state

of unsatisfactory prosecution evidence it is difficult for us to sustain the conviction of the appellant of a serious charge of murder and we have no hesitation to hold that the learned Sessions Judge as well as the High Court committed serious error by relying upon such untrustworthy witnesses. In our considered opinion the prosecution has totally failed to establish the charge against the appellant beyond reasonable doubt and the appellant is entitled to be acquitted. We accordingly, set aside the conviction and sentence passed against the appellant and acquit him of the charges levelled against. This criminal appeal is allowed. The bail bonds stand discharged. A

R.K.S. Appeal allowed.