R.Rachaiah vs Home Secretary, Bangalore on 4 May, 2016

Author: A.K. Sikri

Bench: R.K.Agrawal, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(S). 2375/2009

R.RACHAIAH APPELLANT(S)

VERSUS

HOME SECRETARY, BANGALORE RESPONDENT(S)

WITH

CRIMINAL APPEAL NO. 2376/2009 & CRIMINAL APPEAL NO. 2377/2009

J U D G M E N T

A.K. SIKRI, J.

The three appellants in these three appeals have been convicted for offences punishable under Sections 302 and 364 read with Section 34 of the Indian Penal Code (hereinafter referred to as 'IPC') and all three of them have been directed to undergo sentence of life imprisonment for the charge under Section 302 IPC read with Section 34 IPC and ten years in respect of the charge under Section 364 IPC read with Section 34 IPC. Both the sentences are directed to run concurrently. The conviction and sentence recorded by the Trial Court has been affirmed by the High Court in the impugned judgment dated 22.04.2009 resulting into the dismissal of the joint appeal which was filed by these three appellants.

Though the case history is quite lengthy, having regard to the aspect which we intend to focus on and the fact that on that aspect only these appeals warrant to succeed, it is not necessary to burden this judgment with unnecessary factual details. We would, therefore, be eschewing those facts which are irrelevant for our purpose and would be taking record of such facts that would be relevant to the issue on which we intend to focus.

The appellant/R. Rachaiah (hereinafter referred to as "A-1") is the father of one Prabhavati. Her marriage was solemnised with Dr. N. Shivakumar (since deceased) at Mysore on 28.05.2000. Within two days of the marriage, i.e. on 30.05.2000, Prabhavati consumed poison and as a result she fell unconscious and was taken to B.M. Hospital at Mysore in a critical condition. In the night when Prabhavati had consumed poison, Dr. Shivakumar left Mysore and had gone back to Bangalore. On 31.05.2000, he along with his elder brother Rudraiah (PW-5) and uncle Andanaih traveled to Mysore in a hired Tata Sumo to meet Prabhavati in the hospital. However, when they were about 30 Kms. away from Mysore, as per the prosecution, Dr. Shivakumar telephoned from one STD booth and enquired about the condition of Prabhavati when he was informed that she was dead. On receiving this information, Dr. Shivakumar attempted to commit suicide by slitting his throat by a blade at about 04.30 p.m. At that time he was in the car with his brother and uncle which was being driven to Mysore. In an injured condition, he was shifted to the General Hospital at Bidadi for urgent medical care. The case was also registered against him for attempt to commit suicide under Section 309 IPC with the Police Station at Bidadi. Next day, he was shifted to Shekhar Hospital at Bangalore and admitted in ICU. In that hospital, he tried to commit suicide again by consuming 30 Avil tablets when he was still in the hospital.

As per the story put-forth by the prosecution, on 03.06.2000, an agreement was reached between A-1 on the one hand and the father and brother of Dr. Shivakumar on the other hand to end the marital tie/disputes and it was agreed that A-1 would be paid a sum of Rs. 8 lakhs to compensate for the marriage expenses which was incurred by him on the marriage of his daughter Prabhavati. While the condition of Prabhavati was still critical and she was in the hospital, on 07.06.2000, her statement was recorded wherein she allegedly said that in the night of 30.05.2000 i.e. about 10 p.m. while she was in the bedroom with Dr. Shivakumar, he had administered poison to her suspecting that she had illicit relationship with her maternal uncle. Based on this statement of Prabhavati, a case i.e. Crime No. 82/2000 was registered under Section 498A and 307 IPC against Dr. Shivakumar at Mysore Police Station. At that time, as already pointed out above, Dr. Shivakumar was also in the Shekhar Hospital in Bangalore. On 08.06.2000, he went to the toilet attached to the ICU and cut his wrist vein, which was another attempt on his part to commit suicide.

On 09.06.2000, Dr. Shivakumar was got discharged from Shekhar Hospital at the instance of these appellants. The prosecution alleges that it was against medical advice that the accused persons got him discharged and took him away to the house of A-1. On 10.06.2000, the dead body of Dr. Shivakumar was found on the railway track near Naguvanahalli, which is 30 Kms. away Mysore. The body of Dr. Shivakumar was cut into two pieces due to the train running over him. The post-mortem of the dead body was conducted. However, no case against anybody was registered either for suicidal or homicidal death even after receiving the post-mortem report. The dead body of Dr. Shivakumar was taken and duly buried by performing all last rites. It appears that few days thereafter, i.e. on 28.06.2000, the father of the deceased submitted a written complaint to the Secretary, Home Department, Government of Karnataka. On the basis of this complaint, fresh investigation to find out the cause of death was started. The body of Dr. Shivakumar was exhumed and again medically examined. Even the said examination did not implicate anybody. However, the father of the deceased persisted with his complaint which led to constitution of a Committee of five expert doctors which gave its report (Exhibit P-36). Further investigation was carried out on that basis and,

ultimately, on 23.01.2002, charge sheet was submitted in the Court. In this charge sheet filed by the police, after investigation, it was alleged that a prima facie case against all the three accused persons was made out under Section 306 and 365 read with Section 34 IPC. A-1 was arrested on 23.01.2002 itself and was released on bail on 06.03.2002. Thereafter, charges were framed by the Court of Sessions on 19.02.2004 under Sections 306 and 365 read with Section 34 IPC against all three accused. Trial proceeded on the basis of these charges. In all, 27 witnesses were examined which included seven Police Officers, four Doctors and two Narcotic Experts. When PW-26 was examined on 25.07.2006, thereafter, an application was filed by the prosecution under Section 216 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") for framing of additional charge under Section 302 IPC. This application was resisted by the accused persons. However, their objections were rejected and on 30.09.2006, the Trial Court framed "ALTERNATIVE CHARGE" under Section 302 IPC read with Section 34 IPC. As mentioned above, by that time, 26 witnesses had already been examined. Thereafter, only one more witness i.e. PW-27/Deva Reddi, Deputy Superintendent of Police was examined. The statement of accused persons under Section 313 of the Code was also recorded.

The Trial Court convicted all the three accused persons under Section 302 IPC read with Section 34 IPC and also under Section 364 IPC read with Section 34 IPC. What follows from the above is that the appellants were not convicted of the original charge framed either under Section 306 or Section 365 IPC. Instead of Section 306 IPC, the appellants were convicted in respect of 'alternative charge' under Section 302 IPC. The other offence for which they were charged was under Section 365 IPC but the conviction was recorded under Section 364 IPC on the ground that even when the charge framed was under Section 365 IPC, the evidence produced by the prosecution shows existence of all ingredients under Section 364 IPC.

The appellants filed a common appeal against the said conviction taking a specific plea to the effect that there could not have been any conviction under Section 302 IPC. In this regard, it was also pleaded that, the 'alternative charge' under Section 302 IPC was wrongly framed without following the procedure under Sections 216 and 217 of the Code and, therefore, the entire trial insofar as conviction under Section 302 IPC is concerned stood vitiated. It was further argued that there could not have been any conviction under Section 364 IPC as well in the absence of any specific charge under this section. The appellants also challenged the conviction on merits.

The High Court, in detail, discussed the merits of the case and did not find favour with the arguments of the appellants. It is not necessary for us to go into this aspect as we find that the trial which is conducted and on the basis of which conviction is recorded under Section 302 IPC is clearly vitiated as the same is in violation of the mandatory procedure prescribed under Sections 216 and 217 of the Code. These two sections are reproduced below:

> "216. Court may alter charge.
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> (1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary. (5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

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. B.- Joinder of charges The bare reading of Section 216 reveals that though it is permissible for any Court to alter or add to any charge at any time before judgment is pronounced, certain safeguards, looking into the interest of the accused person who is charged with the additional charge or with the alteration of the additional charge, are also provided specifically under sub-sections (3) and 4 of Section 216 of the Code. Sub-section(3), in no uncertain term, stipulates that with the alteration or addition to a charge if any prejudice is going to be caused to the accused in his defence or the prosecutor in the conduct of the case, the Court has to proceed with the trial as if it altered or added the original charge by terming the additional or alternative charge as original charge. The clear message is that it is to be treated as charge made for the first time and trial has to proceed from that stage. This position becomes further clear from the bare reading of sub-section(4) of Section 216 of the Code which empowers the Court, in such a situation, to either direct a new trial or adjourn the trial for such period as may be necessary. A new trial is insisted if the charge is altogether different and distinct.

Even if the charge may be of same species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to prepare and defend himself. It is, in the same process, Section 217 of the Code provides that whenever a charge is altered or added by the Court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or re-summon or examine any witnesses who have already been examined with reference to such alteration or addition. In such circumstances, the Court is to even allow any further witness which the Court thinks to be material in regard to the altered or additional charge.

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 fag 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.

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.

In a case like this, with the framing of alternative charge on 30.09.2006, testimony of those witnesses recorded prior to that date could even be taken into consideration. It hardly needs to be demonstrated that the provisions of Sections 216 and 217 are mandatory in nature as they not only sub-serve the requirement of principles of natural justice but guarantee an important right which is given to the accused persons to defend themselves appropriately by giving them full opportunity. Cross- examination of the witnesses, in the process, is an important facet of this right. Credibility of any witness can be established only after the said witness is put to cross-examination by the accused person.

In the instant case, there is no cross-examination of these witnesses insofar as charge under Section 302 IPC is concerned. The trial, therefore, stands vitiated and there could not have been any conviction under Section 302 of the IPC.

Though, in the given case, it would be doubtful as to whether the appellants can now be convicted under Section 306 IPC as we, prima facie, find that the charge under Section 302 was in substitution of the earlier charge under Section 306 as both the charges cannot stand together. (See: Sangaraboina Sreenu Vs State of A.P. (1997)5 SCC 348).

In any case, it is not necessary to go into this aspect because of the reason that even if it is permissible for the prosecution to press the charge under Section 306 and even if it is presumed that such a charge is established, all the appellants have already suffered incarceration for more than eight years. For the same reason, we do not intend to go into the issue of conviction of these appellants under Section 364, when the charge was framed under Section 365 IPC. We, thus, reduce the sentence to the period already undergone and direct that the appellants shall be released forthwith, if not required in any other case.

The appeals are, accordingly, allowed.

.....J. [A.K. SIKRI] .....J. [R.K.AGRAWAL] NEW DELHI;

MAY 05, 2016.