

Jogi Nahak Vs. the State

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Court : Orissa

Decided On : Sep-04-1964

Reported in : AIR1965Ori106; 1965CriLJ51

Judge : R.K. Das, J.

Acts : [Probation of Offenders Act, 1958](#) - Sections 4 and 6; [Indian Penal Code \(IPC\), 1860](#) - Sections 394

Appeal No. : Criminal Appeal No. 216 of 1963

Appellant : Jogi Nahak

Respondent : The State

Advocate for Def. : Government Adv.

Advocate for Pet/Ap. : S.B. Nanda, Adv.

Judgement :

R.K. Das, J.

1. The appellant has been convicted under Section 394, I. P. C. and sentenced to R. I. for one year by an order dated 7-12-1963 of but Sessions Judge of Ganjam Boudh.

2. Kumuda (P. W. 2) a girl of four years is the daughter of Gourhari Naik (P. W. 1). She was wearing a golden Khasumali in her neck and two golden ear-rings on her ears the value of which would be about Rs. 100/-. On the date of occurrence, that is, 13-3-63 the girl was found missing from home. P. W. 1 searched for his daughter, but could not trace her. At about 1 P. M. that day, the Pujari of Radhakanto Mohaprabu Temple of the village found the girl in an injured condition in the premises of the temple with several injuries on her head. He brought the girl to P.W. 1 and P. W. 1 found the ornaments missing from her person. Thereafter P. W. 1 and some others went to the temple premises and found blood stains on the ground and some broken bangles and a big stone stained with blood lying at the place. P. W. 8 Raghunath Bastia who had a thrashing floor near the temple informed them that he had seen the accused running away in suspicious manner sometime ago. P. Ws. 5 and 6 then were deputed on a bicycle to search for the accused. P. W. 1 went with the injured girl to Purusottampur Police Station and lodged the F. I. R. (Ext. 1) against an unknown accused. In the meantime the accused while running away with the gold ornaments was caught by P. Ws. 5 and 6. Later on, he was arrested and after investigation, a charge-sheet was submitted against him and after commitment he was placed under trial before the Court of Session.

3. The accused Jogi Nahak who is a young boy of fifteen years denied to have committed the offence.

4. Two charges were framed against the accused, one under Section 394 I. P. C. and the other under section 397 I. P. C. The learned Sessions Judge acquitted him of the charge under Section 397 but convicted him under section 394 I. P. C. and sentenced him to undergo R. I. for one year. The appellant has presented this appeal from jail against the above order of conviction and sentence.

5. The only witness to the actual assault is the victim girl, Kumuda herself. She has stated that the accused induced her to accompany him by saying that he would give her some mangoes and so saying he took her to the temple and assaulted her on her head. She lost her senses and as such she was unable to say when actually the ornaments were removed. The girl is only aged four years. I

do not think it is safe to rely upon her evidence, though the learned Sessions Judge was satisfied that she was capable of understanding questions that were put to her, though she could not express herself quite well.

6. Mr. Nanda, learned counsel for the appellant, rightly contended that much reliance cannot be placed on the evidence of the child witness, but there is enough other evidence from which the guilt of the accused can be well established.

7. That the girl P. W. 3 received some injuries is beyond dispute. Immediately after the occurrence, the girl was examined by a doctor (P. W. 4) the Medical Officer of Purusottampur. He found as many as 11 injuries on her person including some lacerated wounds on her fore-head. According to the doctor by the time of his examination the injuries were about 24 hours' old and injuries Nos. 1, 2, 3 and 7 could be caused by some blunt hard and rough substance and the other injuries were scratches and contusions. The blood-stained stone, MO. XIII was recovered from the place of occurrence and the doctor was of the opinion that the stone was capable of causing the above injuries. The doctor further said that though he had not specifically stated to have noticed the multiple scratches on the victim, to a suggestion of the defence he denied that all these injuries could be caused by a fall. Thus there cannot be any doubt that P. W. 2 received a large number of injuries on her head and other parts of her body on the date of occurrence while the ornaments were removed from her person.

8. No doubt, there is no direct evidence as to the actual assault, but the circumstantial evidence appears to be conclusive and leaves no room for doubt that it was the accused who was the author of the crime. It is the evidence of P. W. 3 that he knew the accused previously and he found the accused coming out of the temple of Radha-kanta deity through a broken portion of the compound wall on the south-east and was running away. This was at about 11 A. M. on the date of occurrence. P. W. 3 informed this fact to P. W. 1. It is the evidence of P. W. 5 that he was deputed by P. W. 1 to search for the accused. Before him P. W. 6 Sankar Naik, a student aged about 17 years had been sent to search for the accused. When P. W. 6 went on searching for the accused he found the accused coming from the opposite direction being chased by P. W. 6 and one constable. P. W. 5

immediately got down from his cycle and caught hold of the accused. The S. I. of Police (P. W. 9) also came there and the necklace and the ear-rings were seized from the accused.

It was suggested to P. W. 6 that it was he who gave the accused the gold ornaments in a hotel near the railway station. But this was denied by P. W. 6. Nothing has been brought out from the evidence as to why he would falsely depose against the accused. P. W. 7 is a business man before whom the seizure was made under seizure list, Ext. 3 by the S. I., P. W. 8. Thus, even if we exclude the evidence of P. W. 2, the clear evidence of other witnesses stated above, fully establishes that it was the accused who after committing the crime escaped through the broken part of the compound wall of the temple and was running away with the articles when he was caught red handed by the Police and the witnesses as stated above. The accused had no explanation to offer as to how he came to possess these articles. In the absence of such explanation, the legitimate inference is that he was the author of the crime that was committed inside the temple premises, There cannot be any doubt that the accused committed robbery of the ornaments of P. W. 2 and for committing such an offence, he also caused hurt to her and thus made himself liable for an offence under Section 394 I. P. C.

9. A legal question of some importance that arises in this case is whether the appellant is entitled to the benefits of the provisions of the Probation of Offenders Act (Act 20 of 1958) (hereinafter described as the 'Act'). The provisions of Section 4(1) of this Act and that of Section 562 Cr. P. C. are analogons in nature. Both these provisions give powers to the Court to release certain class of offenders on probation of good conduct or alter due admonition. Under Section 19 of the Act, the provisions of Section 502, Cr. P. C. shall cease to apply to the States or parts thereof in which the Act is brought into force. By notification dated 30-11-1962 the Government of Orissa brought the Act into force in some districts of Orissa including Ganjam where the occurrence took place.

10. Section 4(1) of the Act lays down that where a person is found guilty of an offence not punishable with death or imprisonment for life the court may release him on probation of good conduct under certain circumstances. Section 6(1)

makes it obligatory for the Court not to pass a sentence of imprisonment if an offender is under 21 years of age and has committed an offence punishable with imprisonment, but not with imprisonment for life. Even in cases where the offence committed is not punishable with imprisonment for life, the Court may still award a sentence of imprisonment and may not release the offender on probation of good conduct under Section 4 or after admonition under Section 3. But in that case the court has to record its reasons for the same and has to be satisfied that the case is a fit one where the accused should be sentenced to imprisonment.

11. The obvious object of Sections 4(1) and 6(1) of the Act is that persons found guilty of serious offences will not be given the benefits under the Act. The seriousness of an offence could be known from the punishment provided for it. The offence under Section 394, I. P. C. is punishable with imprisonment for life or rigorous imprisonment for 10 years and fine. Such punishments have been provided for a number of offences under the Indian Penal Code such as Sections 376, 400 and 409 etc.

12. It was contended on behalf of the appellant that the sentences provided under this section being alternative in nature, it cannot be said to be an offence punishable with imprisonment for life and as such there is no bar for the Court to exercise jurisdiction under Section 4 or 6 of the Act and the offender should have been released under Section 4 on probation of good conduct and the award of sentence of imprisonment without passing any reason for the same is not in accordance with law. The construction of such provisions as 'death or imprisonment for life' and 'imprisonment for life or imprisonment for ten years' came up for consideration before several High Courts and it was held to mean that they are not in the nature of an alternative sentence. In a case reported in *Emperor v. Bakhsha*, 36 Cri LJ 105 (2) (AIR 1934 Lah 131) the accused was convicted under Section 394, I. P. C. The question was whether the accused aged 18 years could be bound down under Section 562, Cr. P. C. Shadilal, C. J. held that the punishment provided under the section is not of an alternative nature and the offender could be awarded a punishment of transportation for life (now imprisonment for life).

So Section 562, Cr. P. C. has no application to such a case and the order for binding down the accused under Section 562, Cr. P. C. is illegal. A full Bench Decision of the Rangoon High Court in a case reported in *Emperor v. Nga San Htwa*, AIR 1927 Rang 205 (FB) also held the same view.

Their Lordships held that the phrase 'death or transportation for life' in Section 497 Cr. P. C. must be read disjunctively as if it ran 'punishment with death or punishable with transportation for life.' Their Lordships were dealing with the point as to whether under Section 497, Cr. P. C. the Magistrates had power to grant bail in cases of non-bailable offences except in cases 'punishable with transportation for life or with death' A person accused of a non-bailable offence may be released on bail but he cannot be so released if he is guilty of a serious offence. So it was provided under Section 497, Cr. P. C. that a person accused of any non-bailable offence shall not be released on bail if there are grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.

13. The Allahabad High Court in a case reported in *State v. Sheo Shanker*, 1936 Cri LJ 659: (AIR 1956 All 326) took the same view. In that case the accused was convicted under Section 409 where the punishment provided was of identical nature as the Section 394, I. P. C. The Magistrate though convicted him under Section 409, I. P. C., released him on probation of good conduct under Section 4 of the U. P. First Offenders Act. Their Lordships set aside the order of the Magistrate holding that the sentence provided under Section 409 is not of an alternative nature and the U. P. First Offenders Act does not apply to such a case,

14. The Madhya Pradesh High Court in a case reported in *Chetti v. State of Madhya Pradesh*, AIR 1959 Madh Pra 291 took the same view. Their Lordships relied upon the aforesaid Full Bench Decision of the Rangoon High Court. The same view has also been adopted by the other High Courts of India; see AIR 1934 Lah 131, *Public Prosecutor of Madras v. Paneswar Rao*, AIR 1946 Mad 173, *Sarkar v. Jalam Singh*, AIR 1950 Raj 28, *Emperor v. Mt. Janki*, AIR 1932 Nag 130, *Naranji Premji v. Emperor*, AIR 1928 Bom 244. Thus the authorities have well settled this point. The phrase 'not punishable with death or imprisonment for life' or 'imprisonment for life or imprisonment for ten years and fine' cannot be read

conjunctively so as to mean that they provide an alternative sentence for those offences.

15. The appellant cannot, therefore, derive the benefits of the provisions of the Probation of Offenders Act so as to entitle him to be released on probation of good conduct.

In view, however, of the fact that the accused is a young boy of 15 years and a longer stay in the company of criminals will only turn him to be a hardened criminal, I would while, maintaining his conviction under Section 394, I. P. C., reduce his sentence to the period already undergone, and direct that he be set at liberty forthwith.

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