Sankarsan Boral Vs. the State

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Court : Orissa

Decided On : Jul-27-1956

Reported in : 22(1956)CLT475; 1957CriLJ286

Judge : Narasimham, C.J.

Appellant : Sankarsan Boral

Respondent : The State

Judgement :
ORDER

Narasimham, C.J.

1. This is a revision petition against the appellate judgment of the Sessions Judge of Cuttack maintaining the conviction and sentence passed by a First Class Magistrate of Kendrapara against the petitioner for an offence under Section 456 of the Indian Penal Code.

2. The petitioner is a Matriculate, aged about 22 years, residing in village Kusunapur, P. S. Patkura. He was prosecuted in the Court of the 1st. Class Magistrate of Kendrapara on the allegation that he entered the dwelling house of one Domei Naik (P.W.I) of his village at about 3 A.M. on the 22nd March 1954 and committed theft of some utensils. Domei Naik woke up on hearing some noise, and claimed to have seen the petitioner with the stolen utensils. He challenged him and then the petitioner tried to conceal himself in the kitchen where there was

a fight between him and Domei in the course of which both of them received injuries. The petitioner, however succeeded in running away from the place. On these allegations a charge under Section 457, Indian Penal Code, and another under Section 392, Indian Penal Code, were framed against the petitioner. In the charge under Section 457, Indian Penal Code, it was expressly stated that the petitioner entered the dwelling house of Domei Naik with the intention of committing robbery, The trial Court, however, after a full discussion of the evidence held that the story about theft of utensils could not be believed. He therefore acquitted him of the charge under Section 392, Indian Penal Code. Nevertheless he found that the petitioner entered the dwelling house of Domei Naik with the intention of committing some other offence or of insulting or annoying P.W. 1 who was in possession of the same. He therefore, reduced the offence under Section 457, Indian Penal Code to one under Section 456, Indian Penal Code, and sentenced the petitioner to-undergo rigorous imprisonment for 6 months. On appeal the learned Sessions Judge practically affirmed the finding of the Magistrate, though not in very clear terms. He observed that though the entry into the house was not for the purpose of committing theft or robbery, it may be reasonably presumed, from the circumstances, that the entry had been made with such an intent as was provided in Section 456, Indian Penal Code.

3. The petitioner, however, completely denied the incident and alleged that he was the victim of a false charge on account of previous enmity. He never took the plea that he entered the house for some other purpose. But during the hearing of the appeal by the Sessions Judge an argument was advanced that he might have entered the house with an immoral motive, towards some inmates of the house. The learned Sessions Judge, however, negatived this contention as belated and fantastic.

4. Mr. Pal on behalf of the petitioner urged that in view of the charge, as framed against the petitioner under Section 457, Indian Penal Code, the two lower Courts committed an error of law in convicting the petitioner under Section 456. The findings of both the Courts as regards the intention with which the entry was effected Inside the house of P.W. 1. is clearly unsatisfactory. They have held that the entry was not made for the purpose of committing theft as specified in the

charge. They have not further held that the entry was made with any particular intention. They have simply said in a general way that the entry must have been made with the intention of committing an offence, or with a view to insult or annoy P.W. 1 who was in possession of the house. Such a finding will not suffice to sustain a charge under Section 456, Indian Penal Code. On the facts found a Court must come to a definite inference as to what was the particular intention with which the entry was effected. If the intention was to annoy the inmates such a finding should be clearly mentioned in the Judgment. If, on the other hand, the intention was to commit some other offence such as adultery or unnatural offence with the inmates of the house, a finding to that effect must be recorded, based on evidence. A vague statement that the petitioner must have intended to annoy or insult the inmates would not suffice.

5. This unsatisfactory feature in the judgments of the two lower Courts is alone sufficient to set aside the conviction and sentence but I may also briefly refer to certain decisions oiled by Mr. Pai in support of his contention that when a person is charged under Section 457, Indian Penal Code, on the allegation that he entered the dwelling house of another person with the intention of committing theft it will not be legal to convict him under Section 456 Indian Penal Code, on the ground that the entry was made with the intention of committing some other offence or with the intention of annoying or insulting the inmates. The earliest decision on this question is Jharu Sheikh V. Emperor, 16 Cal. W.N. 696, (A) which has been followed in Mahomed Hossein v. Emperor ILR 41 Cal 743 : AIR 1914 Cal 663 (B) and in a later Patna decision reported in Raghu Singh v. Emperor AIR 1920 Patna 590 (C). These decisions were again reviewed in a later Patna decision, reported in Balkishwar Singh v. Emperor AIR 1922 Patna 5 (D) where it was pointed out that prejudice is generally caused if an accused is convicted of having entered a house with an intention different from that specified in the charge. In a subsequent Calcutta decision reported in Hajari Sonar v. Emperor 26 Cal. W.N. 344 (E). the same point was further emphasised and it was observed that when a charge has been definitely framed in which theft is alleged, the accused cannot be convicted of house trespass with some other object, without an amendment of the original charge unless the Court is satisfied that he has not been prejudiced in his defence by the omission to amend the charge.

6. In some of the other decisions where the accused has admitted entry into a house and alleged a specific purpose, the Courts have held that no prejudice would be caused even though the original charge specified theft as the intention with which the entry was effected and the finding was that the entry was effected for the purpose of carrying on illicit intrigue with some of the inmates Of the house. I may in this connection refer to Jadav Mahton v. Emperor AIR 1821 Patna 217 (P) and Karali Prasad v. Emperor AIR 1917 Cal 824 (G) where 16 Cal W. N. 696 (A) was discussed and distinguished.

7. It was however urged that an offence under Section 456, Indian Penal Code was a minor offence and that, consequently under Section 238 (2) of the Criminal Procedure Code, it was open to the Magistrate to convict the accused under that section even though he was charged with the major offence under Section 457. There might have been some force in this contention, if the intention with which the entry was effected as specified in the charge under Section 457 and the intention with which the entry was effected as found by the trying Court while convicting the accused under Section 456, have something in common. But where the intention differs fundamentally, it is always a question, whether prejudice has been caused by convicting the accused of an offence involving an intention different from that specified in the original charge-Doubtless if on the facts admitted it is clear that the entry was made with the intention of committing some other offence i.e., an offence different from that specified in the charge, it may be open to the Court to convict him under Section 456, Indian Penal Code as there could be no prejudice. But where the entry is not admitted and it is-difficult to hold, on the facts proved by the prosecution that the entry was effected with the intention of committing any offence, a Court will not be justified in conjecturing as to what the intention might have been. Similarly, a Court will not be justified in saying that any entry into another man's house at that hour of the night must necessarily cause annoyance to the inmates of the house and consequently the entry into P.W. 1's house was effected with the intention of annoying the inmates thereof. There is always a sharp distinction between 'intention' and 'knowledge' in criminal law, and if it appears that the intention with which the entry was effected was quite different even though the accused knew that his presence if detected would cause annoyance to the inmates he cannot be held guilty of having entered

another man's house with the intention of causing annoyance to the inmates. On the other hand, the very fact that he took care to conceal his presence so that it may not be noticed by the inmates of the house would indicate that he had no intention to annoy the inmates. I may in this connection refer Mahomed Nasiruddin v. Emperor AIR 1925 Pat. 713 (H), Bageshwari Devi v. Indian Union : AIR1950 Pat295 and Mahomed Yar v. Emperor AIR 1038 Lah 514 (FB) (J) and Abdul Majid v. Emperor AIR 1938 Lah 534 (F B) (K).

8. Here the proved facts are that the petitioner was found inside the dwelling house of P.W. 1 at 3 A.M. When an alarm was raised he tried to conceal himself in the kitchen, unfortunately he was traced out to that place and there was a scuffle between him and the owner of the house-during the course of which both of them sustained injuries. On these proved facts it is difficult to infer irresistibly that the intention of the petitioner in entering the house was to commit some other offence or else to annoy the inmates. There is no evidence on either side as to the main object-with which the entry was effected. The prosecution has clearly come forward with a false charge of theft.

9. It is not safe in these circumstances to surmise that the petitioner must have entered the house with some other specified object in view. There may be some truth in the argument advanced for the first time in the appellate Court that the entry was made for some immoral purpose but that was neither suggested in the lower Court nor admitted by any of the prosecution witnesses and we are left in the realm of pure conjecture.

10. The conviction and sentence of the petitioner must therefore be set aside in any case. The question, however, is whether this is a fit case for ordering a re-trial of the petitioner on a charge under Section 456, Indian Penal Code. I am not satisfied that, any useful purpose will be served by protracting the proceedings any further. The petitioner is an educated young man of 22 years and it is highly unlikely that he would have committed theft in another person's house like an ordinary criminal. Both sides have suppressed some other facts and circumstances which are not likely to be revealed even if a fresh trial is ordered. Moreover ~h. was kept in custody for a day or two before being released on bail,

and I think he has been sufficiently penalised. Taking all these circumstances into consideration I would direct that no retrial shall be held,

11. The conviction and sentence are set aside and the petitioner is acquitted.