

Harihar Singh, Vs. State of Orissa

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Court : Orissa

Decided On : Jun-20-1997

Reported in : 1997(2)ALT(Cri)10; 84(1997)CLT269; 1997(II)OLR75

Judge : P.K. Misra, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 313; [Evidence Act, 1872](#) - Sections 11 and 40 to 43;

Appeal No. : Criminal Revision Nos. 504, 506, 533 and 539 of 1995

Appellant : Harihar Singh, ;rosan Alli, ;ashok Mohanty and anr. and Babuli Alias Gunanidhi Puhan

Respondent : State of Orissa

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : S. Ch. Sahoo, S. Kumar Sahoo, S. Ketan Nayak, G. Ch. Swain and A.P. Ray (Cr. Rev. 504/95), B. Panda, S.R. Mohapatra and A. Das, (Cr. Rev. 506/95), S. Das, J.K. Mohanty and Y. Nayak (Cr. Rev. 533/95)

Disposition : Petition allowed

Judgement :

P.K. Misra, J.

1. Eight accused persons were convicted by the Assistant Sessions Judge, Bhadrak, Under Sections 399 and 402, Indian Penal Code, and sentenced to undergo R.I. for four years on each count. The sentences were directed to run concurrently. Criminal Appeal No. 32/93 was filed by seven of the convicted persons whereas Criminal Appeal No. 35/93 was filed by the other convicted person, namely accused Babuli alias Gunanidhi Puan. Both the appeals were taken up together and dismissed by a common order passed by the Additional Sessions Judge, Bhadrak. Five of, the convicted persons have filed the present Criminal Revisions which are being disposed of by this common judgment.

2. P.W.5, the S.I. of Police, Bhadrak (R) Police Station, while performing anti-dacoity patrol duty along with other members of the staff saw flashes of torch-light near Bhadrak-Dhamnagar Road at about midnight of 6/7.3.1992. Entertaining suspicion, he called some persons of Chunida Bazar and proceeded towards the place. It was found that about eleven persons were sitting under a tree and when challenged some of them escaped, but the eight accused persons were caught. On searching the aforesaid persons, weapons such as Bhujali, rifle, sword, iron crow-bar and khukri were recovered, a toy revolver, one torch-light and a rough sketch-map. Seizure lists were prepared. On his own information P.W. 5 drew up an F.I.R. and the various articles were seized under different seizure-lists. On completion of the investigation conducted by P.W. 5 himself, charge-sheet was submitted Under Sections 399 and 402, Indian Penal Code.

3. The plea of the accused persons was one of denial. Some of the accused persons specifically pleaded that all the accused persons had been apprehended earlier and a false case had been foisted.

4. In course of trial, P.Ws. 1, 2 and 3 - the three outside witnesses -stated that the seizure-lists were prepared at the police station on the next date of the alleged incident and the witnesses were asked to sign on the seizure-lists. These witnesses were declared hostile. P.W. 4, S.I. of Police. Bhadrak, had accompanied P.W. 5. Relying upon the evidence of P.W. 5- the informant and the Investigating Officer - as corroborated by P.W. 4, the S.I. of Police, to the effect that the accused persons were found variously armed in a paddy field near Chunida, the

Courts below have recorded the finding of guilt which is being assailed in these revisions.

5. The learned counsels appearing for the four sets of convicted petitioners submitted that P.W. 5 himself being the informant should not have investigated into the offences. They have relied upon the decision of the Supreme Court reported in A.I.R. 1976 S. C. 985(Bhagaban Singh v. The State of Rajasthan). and the decision of the Patna High Court reported in 1986 Cri.L.J. 1031 (Gholtu Modi and etc. v. State of Bihar). There is no hard and fast rule laid down in any provision of the Code of Criminal Procedure or in any decision that in no case, the informant should be the Investigating Officer, though ordinarily, an informant specially where he is also the victim, should not himself be the Investigating Officer. It cannot be said that in every case where such investigation is done by the informant, the trial is vitiated. If no prejudice is caused to the accused persons, such an investigation by the informant himself need not be thrown overboard and the Court can decide about the culpability of the accused persons depending upon the materials on record. Though it is desirable that informant should not investigate a case himself, there is no absolute proposition of law that all such investigations held by an informant-Investigating Officer are vitiated. In the facts and circumstances of the present case, I do not find that any prejudice has been caused to the accused persons by such investigation held by P.W. 5-Informant and as such the contention raised by the learned counsels for the various petitioners is not accepted.

6. It is next contended that the accused persons have been prejudiced by the fact that the trial Court had rejected the application for recalling P.W. 5 for further cross-examination. On perusal of the lower court records, it is found that some of the accused persons filed an application for recalling P.W. 5, the Investigating Officer, for further cross-examination specially with reference to his deposition dated 22.7.1993 in S.T. No. 185/92. The said application was rejected by the trial Court mainly on the ground that further cross-examination was not necessary for the just decision of the case and deposition in one criminal case could not be contradicted by referring to evidence in another criminal case. In appeal before the lower appellate Court such a question was re-agitated and the appellate Court

justified the action of the trial Court on the ground that no document had been filed, nor the record had been called for. It also observed that the legality of the order of the trial Court refusing to recall the witnesses had not been challenged in any higher forum and was not available to be agitated before the appellate Court. The aforesaid reasoning of the appellate Court appears to be wholly unsustainable. The appellate Court overlooked the fact that the application for recalling the witness was filed and rejected on 24.7.1993 and soon thereafter the judgment itself was pronounced and as such there was hardly any scope for filing any revision against the order dated 24.7.1993. At any rate, even assuming that a person aggrieved by an order does not file revision, there is no bar for such a person to question the legality of such an order in appeal against the ultimate decision. In the facts and circumstances of the case, the trial Court should have done well in giving an opportunity to the accused persons to recall the Investigating Officer for further cross-examination and the appellate Court could have exercised power Under Section 391 of the Code of Criminal Procedure.

7. It also transpires from the record that the examination of the accused persons Under Section 313, Code of Criminal Procedure, is quite laconic and insufficient. The Courts below seem to have placed much reliance upon the fact that a rough sketch-map (MO-VI) had been recovered from one of the accused persons, namely Rosan Alli and from the said document they have concluded that the accused persons were preparing to commit dacoity in the house of Dhani Parida. The factum of seizure of the rough sketch-map (MO-VI) from Rosan Alli has been put to him and the said accused person had specifically pleaded that the said sketch-map had been created by the prosecution. However, no such question has been put to any other accused persons. If the trial Court intended to utilise the recovery of the said sketch-map from one of the accused persons as indicative of the fact that all the accused persons had assembled together and were preparing for committing dacoity in the house of Dhani Parida, such adverse circumstances should have been put to all the accused persons. Likewise the appellate Court has relied upon the fact that a toy revolver had been seized from accused Harihar Singh. The question relating to such seizure has not been put to any accused person other than accused Harihar Singh. Similarly, the seizure of a torch-light from accused Laxmidhar Moharana, has not been put to the other

accused persons. If recovery of such materials was considered to be incriminating circumstances indicative of commission of the offences Under Sections 399 and 402, Indian Penal Code, such adverse circumstances should have been put to each of the accused persons and not to the particular accused persons alone. It may be that the other accused persons might have been ignorant of possession of such incriminating materials.

8. It has been contended by the learned counsels for the petitioners that merely because the accused persons were found in dead of night at a secluded place being armed, it cannot be concluded that they had assembled there for the purpose of committing dacoity and it may be that they had assembled for commission of such other offences. The learned counsels have relied upon the decision of the Supreme Court reported in A.I.R. 1979 S.C. 1412 (Chaturi Yadav and Ors. v. State of Bihar) in support of such a contention. In the said decision, eight accused persons were found at 10' clock in the night and some of them were armed with guns and cartridges and some of the accused persons ran away seeing the police patrolling party. The accused persons had been convicted by the trial Court as well as the High Court Under Sections 399 and 402, Indian Penal Code. The Supreme Court held that merely from the aforesaid fact, it could not be concluded that the accused persons had assembled for the purpose of committing dacoity and the possibility of their assembling for commission of any other offences could not be ruled out. The aforesaid decision though cited before the appellate Court was distinguished on the ground that the sketch-map showing the direction to the house of the person in whose house dacoity was to be committed and a toy revolver were recovered. In other words, the appellate Court has placed much reliance upon the fact that the toy revolver and sketch-map showing the direction had also been recovered from two of the accused persons. It was, therefore, all the more necessary for the trial Court to put such incriminating circumstances to all the accused persons as the circumstances were sought to be utilised against all the accused persons and not merely against the accused persons from whom such materials were recovered.

9. The question which now crops up is as to whether the matter should be remitted to the trial Court for giving-the accused persons an opportunity to further cross-

examine the Investigating Officer and for rectifying the error regarding the defective examination of the accused persons. Keeping in view the gravity of the alleged offences, ordinarily, I would have remitted the matter to the trial Court for fresh disposal. However, there are certain other circumstances noticed hereunder which discourage me from remanding the matter for fresh disposal.

10. Some of the accused persons had specifically pleaded that a false case had been foisted by the police and as a matter of fact, the accused persons had been apprehended much prior to 6.3.1992, the alleged date of occurrence. As a matter of fact, certified copy of the judgment dated 7.7.1993 in S.T. Case No. 196 of 1992 was filed before the trial Court. In the said case, the very same accused persons had been acquitted of the charges Under Sections 457 and 395, Indian Penal Code, by the very same trial court in respect of an incident dated 2.2.1992. The said judgment was ignored by the trial Court as well as the appellate Court on the ground that it related to some other incident. In the said judgment reference had been made to the deposition of a witness that one or two days after the occurrence, the police had brought the accused persons to Andrei Bazar. On the basis of such statement, the trial Court had concluded that there was reasonable ground to think that the witnesses had seen the culprits prior to the T.I. parade in the said case. The aforesaid conclusion of the trial Court in the said case supports the contention of some of the accused persons that, in fact, prior to 6/7.3.1992, the accused persons had been apprehended, one or two days after the date of incident in the said case, that is to say, on or about 4.2.1992. It is contended that the conclusion of the trial court in the other case (S.T. 196/92) that the very same accused persons were brought by police to Andrei Bazar on or about 4.2.1992 belies the prosecution story in the present case to the effect that the accused persons were found in the night of 6/7.3.1992. The trial Court did not place any reliance upon the said judgment on the ground that the statement of the witness in the said case cannot be considered in the present case as the witness had not been examined in the present case. The appellate Court rejected the contention based on the said judgment on the ground that the said judgment had not been admitted into evidence and as such cannot be taken into consideration. In the alternative, it also found that the reference in the judgment to the statement of one witness who was not examined in the present case cannot help the accused

persons.

While it is true that the recital in a judgment relating to alleged statement of a witness is not ordinarily admissible in a subsequent proceeding for the purpose of proving the statement of the said witness, the judgment itself is admissible for certain purposes as contemplated in Sections 11, 40 to 43 of the Evidence Act. The appellate Court is not correct in stating that no finding has been given in the said judgment. The necessary conclusion in the said judgment is that the present accused persons had been brought by the police to Andrei Bazar one or two days after the date of incident in the said case, that is to say, on or about 4.2.1992. In the present case, the specific plea of some of the accused persons was that prior to 6/7.3.1992 - the alleged date of incident - the accused persons were already in police custody. Such a plea, if accepted, cuts at the very foundation of the allegations made in the present case. The necessary conclusion in the judgment in S.T. No. 196/92 is that on or about 4. 2. 1992. the present accused persons were already in police custody on 4.2.1992, as evident from the necessary conclusion of the earlier decision, in the absence of any material to show that they subsequently escaped or were released by the police, the allegation that they had assembled in the night of 6/7.3.1992. appears to be quite unfounded. Such a conclusion of the earlier decision would constitute, what is known as 'issue estoppel' in the subsequent proceeding. In such view the matter; no useful purpose would be served by demanding the matter to the trial Court for fresh disposal. Besides, as apparent from the lower court records, some of the accused persons were in custody for about 8 to 9, months, whereas some others were in custody for about 15 to 16 months. It would not be in the interest, of justice to prolong their agony by directing re-trial of a matter which is bound to end in acquittal.

11. For the aforesaid reasons, I allow these revisions and set aside the order of conviction and sentence.