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Court : Orissa

Decided On : Nov-09-1993

Reported in : 1994(I)OLR240

Judge : L. Rath, J.

Acts : Indian Penal Code (IPC) - Sections 34, 323, 325 and 448

Appeal No. : Criminal Revision No. 565 of 1992

Appellant : Babulal Sahu

Respondent : State of Orissa

Advocate for Def. : D. Das, AGA

Advocate for Pet/Ap. : H.S. Misra, Adv.

Disposition : Petition allowed

Judgement :

L. Rath, J.

1. The petitioner faced prosecution Under Section 448, 323 and 325 read with Section 34. IPC along with two others who have since been acquitted at the appellate stage. The learned trial Court found all the accused guilty of the charges and sentenced them to R.I., for one month Under Section 448, IPC, R.I. for four

months Under Section 323, IPC and RI for one year under Sec.325,IPC and fine of Rs. 500/-in default to undergo R. I. for one month more. in appeal the learned Additional Sessions Judge set aside the conviction and the sentence of the other accused but maintained the conviction and the sentence of the petitioner Under Section 323. IPC while acquitting him of the other charges. The narration of the prosecution case is that PW 4 had been to his father-in- law's house and while he was there, on 21-2-1984 at about 8 p.m. the two acquitted accused Satyananda and Sadananda came and called him to come outside as he was wanted by a contractor. His mtoher-in-law PW 5 dissuaded him from going out but after PW 4 had come out, he was dealt a lathi blow on the left hand by the petitioner who was concealing himself. PW 1, the brother-in-law of PW 4 came to his rescue but was also assaulted by a lathi receiving injury to his face. Both PWs 1 and 4 went back into the house and bolted the door from inside but the accused persons pushed an iron rod inside through a hole in door which injured the left eye of PW 2, the father-in-law of PW 4 and also caused an injury near the left ear of PW 3. They raised hulla for which the accused went away. The FIR was lodged by PW 4 the next day at around 10 a. m. with the explanation that as they were afraid to come out, the information could not be lodged earlier. The investigation having been taken up and completed the charge-sheet was submitted. The defence of the petitioner was denial and of the case having been falsely foisted against him.

2. Mr. Misra, the learned counsel appearing for the petitioner has urged, in assailing the conviction and the sentence of the petitioner, that in the case the Investigating Officer was not examined, the FIR was not proved and there was delay in lodging the FIR and that since PWs 1 and 4 stated that it was a dark night and it was particularly the statement of PW 4 that he could not identify everybody, the case ought to have ended in acquittal.

3. In support of the submission regarding non-examination of the Investigating Officer. Mr. Misra placed reliance on 1990 (I) OLR 279 (Sk Makbul Khan v. State) in which the observation was made that in case of non-examination of any Investigating Officer two courses are open to the revisional Court ; either to remit the matter back to the trial Court or to direct an acquittal, depending upon the circumstances of the case. Mere non-examin3tion of the Investigating Officer who

is after all only a witness in the case would not automatically vitiate the prosecution case. No doubt the Investigating Officer is an important witness who deposes regarding the manner of his conduct of the investigation, His evidence often becomes important for the purpose of bringing on record the omissions and contradictions of the witnesses. Hence to succeed in nullifying a prosecution for his non-examination, it is necessary for the accused to establish that in fact his non-examination has contributed incurable prejudice to the defence. It may be shown that had the Investigating Officer been examined, questions which were essential to be put to him, could have been put or any question arising out of his investigation or rather the defect in it could also have been brought out through his mouth. But the onus to establish such prejudice lies on the person who complains of it. In the present case no such case is made out. The only submission is that it was the statement of PW 5 that two other independent witnesses were present at the time of occurrence but that they have not been examined as witnesses. The fact is already on record and the examination of the Investigating Officer could have hardly improved the matter. So far as the decision in 1990 (I) OLR 279 (supra) is concerned, it does not take any contrary view. No doubt the observations were made by the learned Judge in a broad manner that when the Investigating Officer is not examined the two courses open to the revisional Court are either to acquit the accused or remand the matter. But what was really meant that such courses have to be adopted by the revisional Court only in the event the Court comes to the conclusion that adoption of either of the methods is necessary. The conclusion has to be first reached by the Court that in fact the non examination of the Investigating Officer has caused prejudice to the accused which warrants an interference in the revisional jurisdiction. Once that conclusion is reached, the case can only end in acquittal or be remanded for examination of the Investigating Officer. This submission of Mr. Misra hence must fail.

4. The second submission that the FIR has not been proved in the case is also not correct. PW 4 in specific terms has proved the FIR as Ext. 1 and his signature thereon as Ext. 1/1. It is the submission of the learned counsel that since the Investigating Officer has not been examined and the FIR was oral one as reported by PW 4 and there is no evidence as to who had subscribed it, the FIR could not be said to have been properly proved. The FIR in a case is only the previous

statement of the informant and is available either to corroborate or contract him. Besides, it serves the purpose of unfolding at the earliest the prosecution case PW 4 not only proved the FIR but also proved his own signature thereon. It does not appear from his evidence that any question was put to him on the basis of the FIR. It is not the case also that there was any embellishment in the prosecution case than from the FIR. There hence is no force in the submission.

5. As regards the question of delay in lodging the FIR, cogent explanation came as to the time-lapse in lodging the FIR. In view of the allegation of rowdy activities of the petitioner, it was natural to expect PW 4 and others to be vigilant. It was quite normal for the witnesses to have felt panicky and apprehensive so as not to venture out in the night. This submission has also no force.

6. The last submission of Mr. Misra has however substance. It is in the evidence of PW 1 that it was a dark night and that he could not say as to who saw the hitting by the rod. PW 4 stated that it was a dark night and that he could not identify all. It does not appear from the evidence of PW 1 as to how he came to identify the petitioner as having dealt the blow on PW 4. It is not his case that any type of light was available to aid the identification. Hence, if it was a completely dark night and no special situation is shown so as to enable PW 1 to identify the petitioner, little credence can be placed upon his evidence of having seen the petitioner assaulting PW 4 by a lathi. The evidence of PW 4 also does not fair better and indeed is rather clinching on the issue since he stated that it was not only a dark night but also he could not identify all. He never stated as to who are the persons he was able to identify. At least the petitioner was not stated to be a person he had identified. That being the total evidence on the question, it has to be held that the prosecution failed to establish of the actual participation in the crime by the petitioner. In that view of the matter, the conviction of the petitioner is not sustainable.

7. In the result, the petition is allowed and the conviction and the sentence of the petitioner are set aside.