

Sadei Swaln Vs. State

Sadei Swaln Vs. State

SooperKanoon Citation : sooperkanoon.com/531757

Court : Orissa

Decided On : Mar-29-1985

Reported in : 60(1985)CLT134; 1985(II)OLR29

Judge : D.P. Mohapatra, J.

Acts : [Evidence Act, 1872](#) - Sections 114

Appeal No. : Criminal Revision No. 253 of 1981

Appellant : Sadei Swain

Respondent : State

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : J.K. Misra and ; R.C. Rath

Disposition : Petition allowed

Judgement :

D.P. Mohapatra, J.

1. The order dated 20. 2. 1981 of the Additional Sessions' Judge, Cuttack, confirming the order dated 21.8.1978 of the Judicial Magistrate, First Class, Baramba, convicting the petitioner under Section 394, Indian Penal Code, for committing robbery, is under challenge in this petition under Sections 397 and

401, Criminal Procedure Code.

2. The gist of the prosecution case was that on 3.9.1975 at about 2 A. M, when the informant (P. W. 2) and the other inmates of his house P. Ws. 3 and 4 were sleeping in the house, the culprits armed with weapons forcibly entered inside the house, threatened and assaulted the inmates, snatched away gold ornaments and cash from them. The F. I. R. was lodged by P. W. 2 on the next day, 4. 9. 1975.

In course of investigation, the police recovered some ornaments, a silver Gotha, two pieces of golden Kanapendi, one gold Chitu, a sum of Rs. 150/-, a Gupti and a Farsa from the house of the petitioner on 6.9.1975 under the seizure list, Ext. 3/1. In the T. I. parade of suspected persons P. Ws. 2, 4 and 6 identified all the suspected persons including the petitioner as it appears from the report Ext. 1. In the T. I, parade of the seized articles P. W. 1 identified the articles seized . from the house of the petitioner. On completion of investigation, charge sheet was submitted under Sections 457 and 391, Indian Penal Code, against four persons including the petitioner.

3. The accused persons took the plea that there was no theft of articles from the house of the informant on the night of 3.9.1975 and in any case they were not involved in such incident. The petitioner claimed the articles seized from his house to be his property. In support of its case the prosecution examined 14 witnesses while the defence examined 3 witnesses to substantiate its stand. P. W. 2 is the informant P. Ws. 1, 3, 4 and 6 are the inmates of the house, P. W. 5 is a seizure witness, P. W. 11 is the Doctor who examined the injured persons, P. W. 13 is the Special Judicial Magistrate who conducted T. I. parade in respect of the seized properties and also suspected persons and P. Ws. 12 and 14 are the Investigating Officers.

D. Ws. 2 and 3 testified that there was no theft in the house .of the informant on the date of occurrence and that accused Dibakar is enimical disposed of towards the informant and some other P. Ws.

4. On a consideration of the materials on record, the learned Magistrate came to hold that on the night of 3. 9. 1975 there was an incident of theft in the house of

the informant and in the said incident the miscreants had inflicted injuries on the persons of Sulochans, Mahargi, Purna and Gadadhar. Regarding involvement of the accused persons in the incident, he refused to place any reliance on the T. I. parade of persons since the identifying witnesses had occasion to see the accused persons before the T. I. parade was held, but accepted the evidence of P. W. 4 regarding identification of accused Bidyadhar and Sadei (petitioner) in Court. On the question of identification of the seized articles, the trial Court found that identification of P. W. 1 of two Kanapendis (M. O. II) and gold Belpatris (M. O. V) in the T. I. parade as well as in Court implicates Bidei and Sadei, in the crime. The Court relied on Illustration(a) of Section 114, Evidence Act to hold them guilty of the offence under Section 394, Indian Penal Code. Regarding charge under Section 457, Indian Penal Code, the learned Magistrate did not accept the prosecution case that the miscreants broke open the sadar door of the informant's house on the night of 3. 9. 1975 and committed robbery. Therefore, he acquitted all the accused persons of the charge under the said section. The other two accused persons were acquitted of the charge under Section 394, Indian Penal Code. Accused Sadei Swain (petitioner) and Bidyadhar Swain were found guilty under Section 394, Indian Penal Code and were each sentenced to undergo rigorous imprisonment for 3 years and to pay a fine of Rs. 200/- or in default, to undergo rigorous imprisonment for 2 months:

On appeal, the Additional Sessions Judge acquitted accused Bidyadhar of the charge under Section 394, Indian Penal Code but convicted the petitioner under the said section solely relying on presumption under Illustration (a) of Section 114, Evidence Act. The appellate Court however, reduced the sentence to 2 years rigorous imprisonment,

5. In view of the facts narrated above, the sole question that arises for consideration is whether in the facts and circumstances of the case the Courts below were justified in drawing a presumption against the petitioner under Illustration (a) or Section 114, Evidence Act and convicting him under Section 394, Indian Penal Code on the basis of such presumption. Section 114 of the Evidence Act and Illustration (a) thereunder may be quoted for proper appreciation of the case :-

'114, The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case.'

Illustrations.

'The Court may presume-

(a) that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.'XXX XXX XXX XXX

The position is well settled that a presumption under the afore-said section does not arise unless ownership of articles, theft and recent possession are established by the prosecution. In other words, before a presumption under Section 114, Illustration (a) can arise, it must be proved that the goods found in possession of the accused have been stolen. The onus of proof regarding these aspects never shifts, it lies on the prosecution. These provisions have been the subject matter of consideration in a large number of decisions of different Courts. Some of the settled principles that have emerged there from may be stated as follows :

(1) Under Illustration (a) the Court may, but it is not bound to draw the presumption. But in any case the onus of proof does not shift-it is still on the prosecution.

(2) It is not the law that if the accused fails to account for his possession of the goods said to be stolen, he must be convicted, even if the other proved facts do not predicate guilt.

(3) If the explanation given may be true although the Court may not be convinced that it is true, the accused is entitled

to an acquittal. Or if the explanation is not inherently improbable or palpably false and the Court finds it to be reasonably true, the adverse presumption shall be deemed to have been rebutted.

(4) The words 'reasonably true' mean that the explanation must be sufficient to cast a doubt of the guilt of the accused.

(5) The accused is not required to prove his explanation by adducing substantive evidence. In many cases it may be impossible for him to do so.

(6) The accused need not even give any explanation unless he is asked to account for his possession.

From the aforesaid, it is clear that one of the main conditions precedent for drawing a presumption under Section 114(a) is possession of stolen property with the accused. Such possession has not only to be recent but also exclusive. Mere recovery of the articles from the house of the accused by itself without further materials, may not be sufficient to establish exclusive possession of the same with the accused.

6. Evidence in the present case when examined in the light of the propositions indicated above, would clearly show that the prosecution has signally failed to prove the necessary condition precedent for drawing a presumption under Section 114(a) of the Evidence Act against the accused. The items of recovery from the petitioner for which he has been held to have been involved in the incident, are two pieces of 'Kanapendi'. The only witness who identified the said article to be stolen property is P. W, 1. Except the bald statement that two gold Kanapendi (M. O. II) belong to her, she has not made any other statement regarding identification of the said article. She has made no statement indicating the reason for her identifying the said pieces to be her. It is well known that Kanapendi is an ornament of common use by women-folk in villages. The petitioner has claimed the property to be his. There is no material to indicate that such a plea is inherently improbable in the facts and circumstances of the case. This being state of evidence, it cannot be safely held that it has been established that the property seized from the petitioner was stolen property.

Further, regarding seizure, the report, Ext. 3/1 only indicates that M.O. II was seized from the house of the petitioner. Such evidence by itself does not establish exclusive possession of the property with the accused. It is just possible that some

other inmate of the house might have been in possession of the said article.

7. Even assuming that the prosecution has been able to establish that the articles seized from possession of the petitioner were stolen property, the question arises what is extent of presumption available to be drawn against him. As Illustration (a) indicates the Court may presume that the petitioner is either the thief or has received the goods known to him to be stolen. The Courts below have not held that there is any other acceptable evidence (except seizure of the articles) to establish participation of the petitioner in the incident. In such circumstances the presumption, even if available to be drawn, cannot be held to extend to hold that the petitioner committed robbery.

8. In view of the aforesaid discussions, taking any view of the matter, the order of conviction of the petitioner under Section 394, Indian Penal Code and sentencing him thereunder is unsustainable and has to be set aside. Accordingly, the revision petition is allowed, the impugned orders passed by the Courts below convicting the petitioner under Section 394, Indian Penal Code are set aside and the petitioner is acquitted for the charge. This bail bond furnished by the petitioner is cancelled.