

**Ratha Jena Vs. State of Orissa**

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**Court :** Orissa

**Decided On :** Sep-06-1985

**Reported in :** 60(1985)CLT497; 1986CriLJ490

**Judge :** K.P. Mohapatra, J.

**Appellant :** Ratha Jena

**Respondent :** State of Orissa

**Judgement :**

ORDER

**K.P. Mohapatra, J.**

1. This revision is directed against the order passed by the learned Sessions Judge, Balasore affirming conviction of the petitioner for an offence under Section 380 of the Indian Penal Code ('I.P.C.' for short) and reducing the sentence of imprisonment to three months.

2. The prosecution case in brief was that in the early morning of 25-7-1973, P.W. 1 (informant) found that a pair of bullocks belonging to him had been stolen from his cowshed. He went in search of them and found one head of bullock near his village. He went in further search of the other bullock along with P.Ws. 2 and 3. In course of search he learnt at village Ranital that the villagers of Mundamara had detained a person on the suspicion that he had stolen a head of bullock. He went

to village Mundamara and found the missing bullock belonging to him. He was also told by P.Ws. 4, 5 and 6 belonging to village Mundamara that the petitioner was taking away the bullock and so he was detained. P.W. 1 thereafter brought the petitioner, as well as, the bullock to Bhadrak Police Station and lodged F.I.R. (Ext, 1). In due course charge-sheet was submitted against the petitioner for having committed an offence under Section 380, I.P.C

3. The defence of the petitioner was that the bullock was being taken by some other person. The villagers of Mundamara could not catch hold of that person, but instead, detained him as he happened to pass through the village immediately after the escape of the real thief.

4. The trial court believed the prosecution case and convicted the petitioner. In appeal the learned Sessions Judge affirmed the conviction, but reduced the sentence.

5. Learned Counsel appearing for the petitioner urged two points, namely, (1) the prosecution failed to establish that the petitioner had committed theft of the bullock or was found in possession thereof soon after its theft and (2) the Investigating Officer having not been examined by the prosecution, the petitioner was prejudiced for his defence.

6. The evidence of P.W. 1, the owner of the bullock, considered along with the evidence of his villagers (PWs. 2 and 3) shows that the missing bullock was found at village Mundamara. Along with the missing bullock the petitioner was detained by P.Ws. 4, 5 and 6. The evidence of P.Ws. 4, 5 and 6, villagers of Mundamara shows that while it was heavily raining in the morning hours, the petitioner and another person were found moving along with the village street with the bullock. This aroused their suspicion and so they detained the bullock, as well as, the petitioner while the other person escaped. In the presence of the witnesses the petitioner confessed that he had committed theft of the bullock. The bullock was identified as belonging to P.W. 1. The evidence of these witnesses is such that it is impossible to disbelieve the same. Particularly, the evidence of P.Ws. 4, 5 and 6 who were independent, unknown to P.W. 1, as well as, the petitioner is of such nature that on no account the same can be discarded. Therefore, the learned

courts below arrived at the correct conclusion on the basis of evidence of P.Ws. 1 to 6 to the effect that the petitioner was found in possession of the bullock which had earlier been stolen from the lawful possession of P.W. 1. The concurrent finding of fact recorded by the learned Courts below based on sound appreciation of evidence cannot be challenged in revision. Therefore, I accept the same and hold that the prosecution clearly established by cogent, credible and reliable evidence that the petitioner had committed theft of the bullock belonging to P.W. 1.

7. The Investigating officer was not examined as a prosecution witness. The orders dated 5-2-79, 14-2-79, 21-2-79, 1-3-79 and 22-3-79 of the trial Court record show that attempt was made for securing the presence of the Investigating Officer. But as he was ultimately found absent on 22-3-79, the prosecution evidence was closed. In appeal before the learned Sessions Judge, a contention was raised that because the Investigating Officer was not examined in the trial Court, the petitioner was prejudiced in his defence. But the learned Sessions Judge in para 6 of his judgment held that no prejudice was caused.

8. It will appear from the evidence of P.Ws. 1 to 6 that the petitioner made extra-judicial confession before them to the effect that he had committed theft of the bullock. The evidence of extra-judicial confession weighed with the learned courts below and was one of the valuable pieces of evidence against the petitioner for arriving at the conclusion that he had committed theft of the bullock belonging to P.W. 1. P.W. 1 was asked a question in cross-examination that he had not stated before the Investigating Officer that the petitioner had made the extra-judicial confession of having committed theft of the bullock. P.W. 1 denied the suggestion indicating that actually he had made a statement before the Investigating Officer that the petitioner had made an extra-judicial confession for having committed theft of the bullock. According to the learned Sessions Judge, this was not a material contradiction because, in the F.I.R. (Ext. 1) P.W. 1 had stated that the petitioner had made such an extra-judicial confession. The reason assigned by the learned Sessions Judge was incorrect according to law, firstly because, he treated the F.I.R. (Ext. 1) as substantive evidence and secondly because, he understated the importance of the statement relating to extra-judicial confession which amounted to contradiction. Such contradiction could have been proved if the Investigating

Officer was examined as a witness in the case. It could have been found out from him that while the petitioner (P.W, ?) made the statement under Section 161 of the Code of Criminal Procedure he did not state before him that the petitioner had made an extra-judicial confession of having committed theft of the bullock. In my opinion, therefore, the statement of P.W. 1 was a material contradiction. Because of his non-examination, the petitioner was precluded from proving a material contradiction which would have helped his defence. In this connection I would refer to a case reported in 1972 Cri LJ 976 (Mys), Hirianna Shetty v. State of Mysore, in which a learned single Judge of the Mysore High Court (as it then was) held as follows:

Strong reliance was placed upon the decision of this Court in P. Rangappa v. State of Mysore (Cr. R. P. 397 of 1970 decided on 5-2-1971) (Mys). In the said case Santosh, J. has observed as follows:It is needless to point out that the right of bringing on record contradictions in the statement of witnesses made before the Investigating Officer is a very valuable right of the accused. It is by showing that the witness has made improvements or given evidence which contradicts his earlier statement, the accused is able to satisfy the court that the witness is not a reliable witness. The non-examination of the Investigating Officer is a serious infirmity in the prosecution case which results in prejudice to the accused.' It is clear from the above decision that the examination of the Investigating Officer is necessary in order to bring on record the contradictions in the statement of witnesses and that such a right is a valuable right of the accused. Further it is clear that non-examination of the Investigating Officer is a serious infirmity, in the prosecution case in so far as it deprived the accused of the opportunity to show to the court that witnesses were not reliable witnesses by proving contradictions in the earlier statement.

In the facts and circumstances of the case, I hold the same view.

9. Apart from proof of contradictions, many material facts could be ascertained for defence of a criminal charge if the Investigating Officer was examined as a prosecution witness. In this particular case the Investigating Officer seized the bullock by seizure list (Ext. 2). Certain facts have been stated in the seizurelist The

Investigating Officer had also received the F.I.R. and conducted investigation into the case. Had he been examined as a witness, the petitioner would have got opportunity of asking many questions to him relating to seizure of the bullock, circumstances of seizure thereof, place of seizure and many other material and relevant particulars relating to the case. As the Investigating officer was not examined as a witness, he was precluded from elucidating material facts which could have helped him in support of his defence.

10. From the aforesaid analysis it is irresistible for me to conclude that non-examination of the Investigating Officer was a vital defect in the prosecution case and caused serious prejudice to the petitioner for his own defence of a criminal charge.

11. In view of the finding that on account of non-examination of the Investigating Officer prejudice was caused to the petitioner, two courses are open. First, to remand the case to the trial Court to summon the Investigating Officer and examine him in court so as to give opportunity to the petitioner to cross-examine him and second, to record an order of acquittal. In Hirianna Shetty's case (supra), it was remanded perhaps in view of the fact that the alleged offence was committed on 1-1-1970 and the decision by the High Court was rendered on 8-10-1971. In this case, however, the offence was committed on 15-7-1973. After passage of twelve years and after the petitioner has been subjected to trial, appeal and revision at three stages, it would cause great hardship to him if the case is remanded to the trial court for examination of the Investigating Officer. I am, therefore, of the view, in the peculiar facts and circumstances of the case, to give the benefit of acquittal to the petitioner on the ground that for non-examination of the Investigating Officer he was prejudiced in his defence and may be, he would have been acquitted by the trial court had the Investigating Officer been examined at the earliest opportunity.

12. Before parting with the case, I observe with distress the apathy of the prosecuting agency and the indifference of the criminal courts to secure presence of material witnesses for the prosecution, such as, Investigating Officers for examination in courts. There have been instances where presence of material

prosecution witnesses are not secured to face cross-examination. There have been instances when medical officers and police officers have been examined, but injury reports and seizure lists which are material documents have not been got proved through them. Neither the prosecuting agency nor the criminal courts seem to bother. Examination of the Investigating Officer is as material for the prosecution as for the defence because, through him a person accused of a criminal charge can successfully prove his defence and secure an acquittal. If on a few dates the presence of the investigating officer is not secured, the prosecuting agency does not insist for securing his presence and the criminal courts take recourse to a shortcut method of closing the prosecution evidence in their anxiety to dispose of the criminal case. No doubt, it is true that criminal cases should be disposed of as early as possible without least possible delay, but at the same time justice should be done, justice both for the prosecution and for the defence. Times without number this Court has observed that courts are not mere passive agents or post offices. They are not expected to exhibit an attitude of indifference to cases, but should actively participate in the proceedings thereof so as to discharge the responsibility reposed on them. It is high time that the criminal courts should awake to their responsibilities.

13. In the result, the revision is allowed and the order of conviction and sentence is reversed. The petitioner is acquitted and be set at liberty. The bail bond is cancelled.