Bijuli and ors. Vs. State

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Court : Orissa

Decided On : Apr-16-1985

Reported in : 1985CriLJ1977

Judge : B.K. Behera, J.

Appellant : Bijuli and ors.

Respondent : State

Judgement :

B.K. Behera, J.

1. These appeals arise out of the same judgment and order passed by the learned Sessions Judge, Balasore, convicting the appellants Baidyanath Sial, Rabindra alias Juga Barik, Ratnakar Behera alias Gobinda Barik alias Shyam Sundar Barik and Bijuli alias Bijay Behera under Section 395 of the I.P.C. (for short, the 'Code') and sentencing each of them thereunder to undergo rigorous imprisonment for a period of eight years and convicting the appellant Ramakanta Behera under Section 412 of the Code and sentencing him thereunder to undergo imprisonment for a period of two years. Another person, namely, Babaji Naik, has been convicted under Section 412 of the Code and sentenced to undergo rigorous imprisonment for a period of three years. It has been reported by the High Court office that Babaji Naik has not prererred an appeal against the judgment and order of conviction. While hearing the appeals, the learned Additional Standing Counsel

has been put to notice to address this Court as to whether the order of conviction recorded against him is to be maintained or is to be set aside in exercise of the revisional jurisdiction of this Court and he has been heard on this question.

2. All the appellants besides the non-appealing convict Babaji Naik and three others stood charged under Section 395 of the Code for commission of dacoity in the house of Sridhar Mohanty (P.W. 1) at Keshapur in the district of Balasore. To bring home the charge, the prosecution had examined seventeen witnesses. The plea of the appellants was one of the denial and false implication. Three witnesses had been examined for the defence. The main evidence on which reliance had been placed by the prosecution was that of the identifying witnesses,-namely, P.Ws. 1, 3 to 5 and 8 and recoveries of articles alleged to have been removed during the commission of dacoity, as testified by the Investigating Officer (P.W. 17), from the appellants and the non-appealing convict Babaji Naik. On a consideration of the evidence, the learned Sessions Judge has not placed reliance on the evidence of P.Ws. 3 to 5 with regard to the identification of the culprits. He has accepted the evidence of P.Ws. 1 and 8 in this regard. P.W.1 had identified in the court and at the test identification parade the appellants Rabindra alias Juga Barik and Baidyanath. P.W.8 had identified in the court and also at the test identification parade the appellants Baidyanath and Bijuli. The learned Judge has placed reliance on the evidence with regard to ,the recoveries of the articles removed during the commission of dacoity and identified by the owners as belonging to them. Three co-accused persons charged of the offence were acquitted owing to paucity of evidence and the appellants besides Babaji Naik have been convicted, as stated above.

3. The learned Counsel for the appellants have taken me through the evidence, particularly, of P.Ws. 1 and 8 and .have submitted that the trial court went wrong in placing reliance on their evidence as regards the identification of three of the appellants. With regard to the recoveries of articles from the appellants and the convict Babaji Naik, it has been submitted before me that the evidence was not worthy of credence and the appellants had seriously been prejudiced in their defence as while examining and recording their statements under Section 313 of the Cr. P.C. due care had not been taken by the trial court to draw the attention of

the appellants to the alleged recoveries of particular articles from their possession. Mr. S. K. Das, the learned Additional Standing Counsel, has very candidly submitted that regard being had to the highly imperfect nature of examination of the appellants and Babaji Naik, it would not be proper to rely on the evidence with regard to the recoveries of the stolen articles from their possession. He has submitted that if the evidence of P.Ws. 1 and 8 is accepted by this Court, the order of conviction can be sustained as against the three appellants identified by these two witnesses.

4. Coming first to the recoveries from the appellants and Babaji, I notice from the statement of each of the appellants and Babaji recorded under Section 313 of the Cr. P.C. that a question had been put that M.Os. I to XLVIII had been identified by the owners to be their properties and then a question had been put to each of them that the articles as per the seizure list had been seized from his possession. TO say the least, this was a highly unsatisfactory state of affairs. The examination of an accused person in a criminal trial is an important part of it and the court should be very careful and cautious in putting questions to the accused persons so that they would be in a position to properly explain the circumstances appearing in the evidence against them. As has been held by this/Court in (1985) 59 Cut-LT 287 Golak Behari Sahu v. State of Orissa, it is fundamental that the attention of an accused person should be drawn to every inculpatory material in order to enable him to explain it. This is the basic fairness of a criminal trial and failure in this regard may gravely imperil the validity of the trial if there has been consequential miscarriage of justice which may be gathered and assumed from the facts and circumstances of the case. In a case of dacoity, recoveries of the stolen articles from some of the accused persons have considerable importance because in appropriate cases, if there be not much of time lag, the persons from whom such articles have been recovered can be convicted for commission of dacoity by drawing a presumption under Section 114(a) of the Evidence Act. Before such a presumption is drawn, as has been drawn by the trial court against the appellants, the attention of the accused persons should have been drawn to the particular recoveries made from them. For instance, while the appellant Baidyanath was examined, the following questions were put with regard to the recoveries:

Q.No. 4 : - The inmates of the house have claimed M.Os. I to XLVIII belonged to their family, what have you to say?

Q.No. 5 : - Evidence has been let in by the prosecution to the effect that the articles mentioned in Ext. 4/5 were recovered from your possession, what have you to say?

Similar questions had been put to the other appellants and the convict Babaji. The particular articles which had-allegedly been recovered from the possession of each of the appellants should have been shown to them so that they could properly explain as to whether those articles had been recovered from their possession. Instead, as omnibus question was put with regard to the evidence of the inmates of the house claiming M.Os. I to XLVIII without any indication that those articles had been shown to any of the accused persons before the answer to this question was recorded. Similarly, by simply referring to the number of the seizure list and without showing the articles recovered from the possession of a particular person, an accused would not be in a position to explain such a circumstance appearing in the evidence against him. In a case of this nature, where a large number of accused persons are involved and a number of articles are recovered from different persons, the trial court should do well to properly question the accused persons drawing their attention to the particular recoveries by showing the articles to them. This is particularly important in cases of possession of articles removed during the commission of thefts, robberies or dacoities. Where as in a case of this nature, the accused is not given a reasonable opportunity to offer any explanation, his conviction cannot-be sustained even if the evidence as to the possession is accepted.

5. For the aforesaid reasons, I am of the view, agreeing with the learned Counsel for both the sides, that the evidence with regard to the recoveries of the stolen articles from the appellants and Babaji should be taken out of consideration. The appellants have been in custody for a considerable period of time and it would not be just and fair to direct a retrial owing to this grave defect in the procedure.

6. There thus remains for consideration the evidence of P.Ws. 1 and 8 who have identified three of the appellants as indicated above, P.W. 1 has claimed to have

identified two of the appellants, namely, Rabindra alias Jagu and Baidyanath, as a lamp was said to be burning and because some of the culprits were focussing their torchlights. For the same reasons, P.W.8 claims to have identified the appellants Baidyanath and Bijuli. It would be seen from the first information report lodged by P.W.1 that vague descriptions had been given regarding the culprits. It had been stated therein that P.W. 1 had been informed by his brother Daitari (P.W. 3) that one person looked like the appellant Juga. No doubt, P.W. 1 had identified both these appellants at the test identification parade which had been conducted on July 16,1982, but it would appear from his evidence that he did not know the culprits from before. According to this witness, the culprits had not covered their faces, but had covered their heads and ears. He had admitted that he did not mark the special features of any of the culprits. In the first information report, he had stated that one of the culprits had tied a piece of cloth around his face and another had tied a piece of napkin around his face. P.W. 8 had identified the appellants Baidyariath and Bijuli as two of the culprits who had removed articles from her bedroom. She had admitted that she had not marked any special features to identify the culprits and she could identify them because they had no covering on any part of their faces. She had not stated in her statement made in the course of investigation as to how many persons she would be able to identify. She had made halting and hesitating statements with regard to the identification of the two culprits.

7. While discarding the evidence of P.Ws. 3 to 5 with regard to identification of some of the appellants, the learned trial Judge has observed that the evidence of P.W. 3 was not relied on because the court was of the view that he was not in a fit state to depose. So far as P.Ws. 4 and 5 were concerned, the trial Judge discarded their evidence of identification by observing thus..:

I am not able to place much reliance on their evidence of identification in court even though they identified the accused persons in the T. I. parade preceding the trial because from their statements recorded Under Section 161 Cr. P.C. it would be found that during the night they were unable to clearly see the faces of the dacoits as some of them had covered their faces with cloth, an indication of which is also to be found in the F.I.R. itself....

If the evidence of two other witnesses with regard to the identification could not be accepted because the culprits had covered their faces, P.Ws. 1 and 8 would not also be in a position to identify the culprits or any of them.

8. For the aforesaid reasons, the evidence of P.Ws. 1 and 8 with regard to the identification of three of the appellants cannot safely be accepted.

9. I thus find that the order of conviction passed by the learned trial Judge against the four appellants under Section 395 of the Code and against the appellant Ramakanta under Section 412 of the Code cannot be sustained. It would also be just, reasonable and legal to set aside the order of conviction and sentence passed against the non-appealing convict Babaji Naik in exercise of the revisional jurisdiction of this Court. . .

10. In the result, the appeals succeed and are allowed. The orders of conviction and sentences passed against the appellants are set aside. The order of conviction and sentence passed against the non-appealing convict Babaji Naik is also set aside. The appellants in the five appeals being disposed of by this common judgment and non-appealing convict Babaji Naik be set at liberty forthwith.