

Tunu Vs. State of Orissa

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Court : Orissa

Decided On : Dec-15-1986

Reported in : 1988CriLJ524

Judge : B.K. Behera, J.

Appellant : Tunu

Respondent : State of Orissa

Judgement :

ORDER

B.K. Behera, J.

1. The petitioners in both the revisions assail the appellate judgment and order passed against them holding them guilty of commission of offences punishable under Sections 326 and 324 read with Section 34 of the Indian Penal Code (for short, the 'Code') and, sentencing each of them to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs. 500/- and in default of payment thereof, to undergo rigorous imprisonment for a further period of ten days passed under Section 326 read with Section 34 of the Code without any separate sentences having been passed under Section 324 read with Section 34 of the Code. The appellate Court has set aside the, order of conviction and sentences passed against the petitioners by the trial Court holding them guilty of the charge under Section 307 read with Section 34 of the Code and sentencing each of them

to undergo rigorous imprisonment for a period of five years and to pay a fine Rs. 2000/- and in default of payment thereof, to undergo rigorous imprisonment for a further period of six months.

2. The petitioners stood charged under Section 307 read with Section 34 of the Code with having attempted to commit the murder of Jugal Singh (P.W. 14) in furtherance of their common intention at the Janhapada Canal bridge situated in the Attabira Police Station area on June 16, 1981, at about 11.30 P.M. while P.W. 14 had been driving his car with his Munshi Nidha Mahar (P.W. 11) and two other co-villagers, namely, Malia Karan (P.W. 8) who had lodged the first information report and Somanath Bhoi (P.W. 9), seated in the vehicle. The allegations against the petitioners were that while P.W. 14 was on the Janhapada Canal bridge with two walls on either side, the petitioner Dhuma alias Saplistar Kumbhar, who was said to be working then as a servant of the petitioner Tunu alias Tirthankar, blocked the way of P.W. 14 by standing on the middle of the road with a bicycle. The petitioner Tunu alias Tirthankar by means of a knife and the petitioner Rajendra Majhi by means of a Bhujali dealt multiple blows on the person of P.W. 14 inside the car whereafter they dragged him out and pressed him against the stoney wall of the canal. P.Ws. 8, 9 and 11 had taken to their heels for their own safety after the petitioner Tunu dealt his first blow, by means of a knife on the person of P.W. 14. This was the case presented by the prosecution. On the basis of the first information report lodged by P.W. 8, who had disowned the contents thereof at the trial and had not supported the case of the prosecution for which he was put leading questions under Section 154 of the Evidence Act, investigation was taken up in course of which the petitioners were arrested and a Bhujali with suspected stains of blood (M.O. III) was seized from the house of the petitioner Rajendra and steps were taken for the treatment of P.W. 14 first at Attabira hospital and then in the Medical College Hospital at Burla where P.W. 14 was confined to his bed for twenty-two days. On the completion of investigation, a charge sheet was placed for prosecution of the petitioners for the commission of an offence under Section 307 read with Section 34 of the Code. The plea of the petitioners was one of denial and false implication.

3. The details of the case of the prosecution have been set out in the judgments of the Courts below and need not be restated in this revisional order. The trial Court held the charge to have been established and convicted and sentenced each of the petitioners as indicated above. The appellate Court took the view that the acts and conduct of the petitioners would not give an indication that they had the intention of committing the murder of P.W. 14, but that they had voluntarily caused grievous hurt and simple hurt to P.W. 14 in furtherance of their common intention and accordingly, while setting aside the order of conviction and sentence passed against each of the petitioners under Section 307 read with Section 34 of the Code, the petitioners were convicted and sentenced for commission of the offences punishable under Sections 326 and 324 read with Section 34 of the Code, as already indicated.

4. Both the revisions have been heard together and will be governed by this common order.

5. It has been contended by Mr. Panda for the petitioners that the order of conviction recorded by the learned appellate Judge in respect of both the offences is misconceived and unfounded and on the basis of the tainted and untrustworthy evidence on record, no order of conviction could be recorded against the petitioners for commission of any offence. It has also been submitted that assuming, without accepting the case of the prosecution, that two of the petitioners had attacked and dealt blows on P.W. 14, they could be convicted under Section 324 of the Code for voluntarily causing hurt and not for causing grievous hurt as the evidence would not warrant a conclusion that the petitioners had voluntarily caused grievous hurt to P.W. 14 and the period of imprisonment already undergone by the petitioners for eleven days would meet the ends of justice. The learned Standing Counsel has accepted the submission made on behalf of the petitioners that no case of voluntarily causing grievous hurt has been made out by the prosecution as the acts of the two assailants would not come within the purview of any of the clauses enumerated in Section 320 of the Code. He has, however, submitted that the petitioners are liable to be convicted Section 324 read with Section 34 of the Code. He has left the question of sentence to be imposed on the petitioners to the discretion of this Court.

6. The trial and appellate Courts have concurrently found that in furtherance of their common intention, the three petitioners had caused grievous hurt to P.W. 14, one of the two petitioners having blocked the way of P.W. 14 while he was driving his car being occupied by P.Ws. 8, 10 and 11 and the other two petitioners having assaulted him and caused a number of injuries by means of a knife and a Bhujali.

7. It would not be permissible for the revisional Court to disturb the findings of facts based on evidence unless they are found to be unreasonable or unfounded. In (1985) 2 OLR 275 *Krushna Prasad v. State of Orissa*, this Court has observed and held:

Although the revisional power of the High Court is as wide as the power of the Court of appeal, it is well-settled that normally, the jurisdiction of the High Court is to be exercised only in exceptional cases when there is a glaring defect in the procedure or there is a manifest error on a point of law which has consequently resulted in flagrant miscarriage of justice. In spite of the wide language of the provision relating to the exercise of revisional jurisdiction, the High Court is not expected to act as if it is hearing an appeal. See : 1979 CriLJ594 *State of Orissa v. Nakula Sahu*. This is not, however, to say that concurrent findings must be stamped as infallible because they are concurrent. If the High Court finds that unreasonable findings which cannot be sustained on the evidence have been recorded by the two Courts, it would be doing justice by setting at naught such findings. Injustice must not be perpetrated because it has been done two times in a case. Two wrong decisions do not make a right one. No doubt, the burden of showing that concurrent decisions of two Courts are manifestly unjust lies on the person challenging them, but once that burden is successfully discharged, it is not only the right, but also the duty of this Court to remedy the injustice. There should be no computerised system of the administration of justice.

8. Ordinarily and normally, concurrent findings arrived at by the trial and appellate Courts are not to be disturbed by the revisional Court, but when the Court finds that the findings recorded by the Courts below are perverse or unreasonable and could not have been arrived at, it would be doing justice by setting aside the findings without being obsessed by the fact that two Courts of facts have arrived at

the same conclusion.

9. In the case on hand, P.W. 14 was the victim of assault, P.Ws. 8, 9 and 11 were his companions in the car being driven by him during the night. It has been urged on behalf of the petitioners that one of the occupants of the vehicle had been working as a servant under P.W. 14 and the others were his co-villagers and they were thus interested witnesses. Merely because one of the occupants was a servant and others were co-villagers of P.W. 14, they could not be dubbed as interested persons. Being the occupants of the vehicle driven by P.W. 14 when the occurrence took place, they were natural and competent witnesses. Their evidence, cannot, therefore, be whittled down on the ground of any interestedness on their part.

10. The evidence of P.W. 14 that he had been assaulted by the petitioner Tunu by means of a knife and by the petitioner Rajendra by means of a Bhujali when he had to stop his vehicle as the other petitioner had blocked the road by keeping a bicycle and as there had been two walls of the bridge on both the sides, he could not escape and was attacked finds assurance from the recovery of damaged articles and earth stained with blood on the spot and the evidence of P.Ws. 10 and 11. It seems unfortunate that at the trial, P.W. 8, who was one of the occupants of the car and had lodged the first information report implicating the petitioners, had given a go by to what he had stated in the first information report and in his statement in the course of investigation for which he was put leading questions by the prosecution under Section 154 of the Evidence Act. It would undoubtedly appear that at the trial, this person had uppressed the truth for some ulterior purpose. There was, however, the evidence of P.W. 9 about two persons attacking P. W. 14 - one having been armed with a knife and the other with a Bhujali and he had identified the petitioner Tunu as one of the assailants although he could not identify the other. P.Ws. 10 and 14 had clearly identified the petitioner Dhuma alias Saplistar as the person who had stood on the road with a bicycle with the evident purpose of forcing P. W. 14 to stop the vehicle. It is in evidence that the three petitioners had gone and brought a bicycle from P.W. 5 sometime before the occurrence. There is also evidence to indicate that the petitioner Tunu had known about the movements of P.W. 14 on the day of occurrence. The evidence of P.W.

14 about the assault on his person by two of the petitioners, namely, Tunu and Rajendra, found assurance not only from the evidence of P.Ws. 9 and 10, but also from the medical evidence discussed in details in the judgments of the Courts below which need not be restated.

11. In the course of investigation, a Bhujali (M.O. III) had been recovered from the house of the petitioner Rajendra. No incriminating articles had been recovered from the possession of the petitioner Tunu. This, however, would belie the story of the prosecution as mere non-recovery of the weapon of attack would not be sufficient to throw out a case of murder or assault and in a number of cases, the investigating agency may not be in a position to recover the weapons of attack.

12. The trial and appellate Judges have, for the reasons recorded in their judgments, held as a fact that while one of the petitioners blocked the way of P.W. 14 who had been driving his car in a moonlit night, the other two assaulted him by means of cutting instruments. There are no justifiable reasons to dislodge this concurrent finding.

13. As regards the complicity of the petitioner Dhuma alias Saplistar, as would clearly appear from the materials placed by the prosecution, the three petitioners had moved together on that day and after plan and premeditation, one of them stood on the road with a bicycle feigning that he was repairing it for which P.W. 14 had to stop and could not proceed further as there was no space and abruptly the other two petitioners attacked P.W. 14. Common intention is to be gathered from the acts and conduct of the accused persons preceding, attending and succeeding the occurrence. No doubt, the petitioner, who had stood on the road and blocked it had not participated in the actual assault, but his conduct in blocking the road and forcing P.W. 14 to stop the car and thereby facilitating the other two persons to attack P.W. 14 would undoubtedly show that he had shared the common intention with the other two petitioners to attack and assault P.W. 14. It is not necessary that to attract Section 34 of the Code, every person must have assaulted and caused hurt. As has been so well-said in the well known case of Barendra Kumar v. Emperor AIR 1925 PC 1 : 26 Cri LJ 431, while discussing the scope of Section 34 of the Code, they also serve who only stand and wait.

14. The next question for consideration is as to what offence had been committed by the petitioners. The learned appellate Judge has held that grievous hurt had been caused to P.W. 14 as the latter had been unable to follow his ordinary pursuits during the space of twenty days. As would appear from his findings, no other clause of Section 320 of the Code defining 'grievous hurt' could be made applicable to the case.

15. Clause 8 of Section 320 of the Code provides that any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits would be construed as grievous. The mere fact that a sufferer has been in the hospital for twenty days or more is not sufficient to attract this clause. It must be proved that during that time, he was in severe bodily pain or was unable to follow his ordinary pursuits. A person with some injuries may be capable of following his ordinary pursuits long before twenty days are over, but may remain as a convalescent in the hospital for the sake of permanent recovery or greater ease or comfort.

16. In the instant case, there is no clear and acceptable evidence that P.W. 14 was suffering from severe bodily pain for twenty days or more or that he was unable to follow his ordinary pursuits for such a period. For these reasons, the learned Counsel for both the sides are agreed that the offence would be one of causing hurt punishable under Section 324 of the Code. I would accept the contention raised on behalf of the petitioners and the concession made by the learned Standing Counsel in this regard and hold the petitioners guilty of causing hurt punishable under Section 324 read with Section 34 of the Code and convict them thereunder.

17. It is in evidence that a dispute with regard to an auction in which the petitioner Tunu was one of the bidders had possibly resulted in the attack on P.W. 14. Being enraged in such circumstances, the petitioner Tunu and his two other associates had evidently wanted to teach P.W. 14 a lesson. The offence of causing hurt is punishable under Section 324 of the Code with imprisonment of either description for a term which may extend to three years or with fine or with both. It has been submitted at the Bar that the petitioners have remained in custody for some time in

connection with this case. It would be just and reasonable to sentence the petitioners to undergo imprisonment for the periods already undergone by them especially in the absence of evidence that they had previously been convicted of any such offence or that they were persons with rowdy elements. No useful purpose would be served by sending them back to the prison to suffer imprisonment for further period

18. In the result, the revisions are allowed in part. The order of conviction and sentences passed against each of the petitioners under Section 324 read with Section 34 of the Indian Penal Code is set aside. The order of conviction passed against them under Section 324 read with Section 34 of the Indian Penal Code is maintained Each of the petitioners is sentenced to undergo imprisonment for the period already undergone by him.

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