

(1995) 08 OHC CK 0020
In the Orissa High Court
Case No : Criminal App. No. 69 of 1986

Baikunthnath Mohanta

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 11-08-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 425, 452, 454
Penal Code, 1860 (IPC) — Section 307, 313, 34

Citation : (1996) CriLJ 661

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : B.P. Ray, for the Appellant; S. Jena, A.S.C., for the Respondent

Judgement

A. Pasayat, J.—In this appeal u/s 454 of the Code of Criminal Procedure, 1973 (in short, "the Code") challenge is to the direction given by the learned Sessions Judge, Keonjhar at the conclusion of trial for confiscation of the gun which was seized during investigation.

2. Appellant Baikunthnath Mohanta (hereinafter also referred to as "the accused") along with one Ganeswar Mahanta, faced trial for alleged commission of offence punishable u/s 307/34 of the Indian Penal Code, 1860 (in short, "IPC") on the allegation that they attempted to commit murder of one Dambarudhar Patra. Learned Sessions Judge found that the materials were inadequate to fasten culpability on the accused persons. Accordingly he directed their acquittal, but observed that there was an allegation against the present appellant for having misused his gun though not proved, and he felt that the licensing authority may take proper steps for cancellation of licence and the gun is to be confiscated and so directed, which is the subject-matter of challenge in this appeal.

3. Undisputedly, learned Sessions Judge has exercised power u/s 452 of the Code. Mr. B. P. Ray appearing for the appellant submitted that there was no material to link the appellant with the alleged offence, and in view of his

acquittal, he was entitled to restoration of the gun seized. With reference to seizure list (Ext.4) and licence (Ext.3), he submitted that the gun in question was seized from the appellant along with licence. Therefore, the gun should have been returned to the petitioner. Mrs. S. Jena appearing for the State, on the other hand with reference to the question No. 15 put to the appellant during his examination u/s 313 of the Code, submitted that the appellant himself denied the ownership of the gun and, therefore, direction given by the learned Judge is in order.

4. The provisions u/s 425 come into operation only on the conclusion of an enquiry of a trial in a criminal court. They refer to four clauses of property or document, viz., (i) produced before the court, or (ii) in its custody, or (iii) regarding which any offence is committed, or (i v) which is used in the commission of any offence. Such property may be disposed of in any of the four ways; that are (a) destruction, (b) confiscation, (c) delivery to a person entitled to its possession (d) or otherwise. Section 452 of the Code which empowers a criminal court for disposal of property at conclusion of an inquiry or trial vests ample discretion in the court to determine person who is entitled to be in possession of the said property. The court has, therefore, jurisdiction to decide the question of possession. Undisputedly, the general rule is that when a property is seized from a person and he is acquitted of the charge, that property should be returned to him. But this rule is itself subject to several exceptions depending on the circumstances of each case and no accused person can claim as of right that the property seized should be returned to him. The discretion vested in the court should be exercised on sound judicial principles and not in a mechanical manner. Discretion means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful. Discretion is not the naked, unfettered power to turn thumbs down or thumbs up. Exercise of discretionary powers involve two elements; (a) an objective element, and, (b) subjective element. The existence of an objective element is a condition precedent for exercise of the subjective element.

5. Section 452 of the Code authorises the Court to return the articles, whether or not an offence is committed in respect thereof, to the person claiming to be entitled to possession. The expression "person claiming to be entitled to possession" is important. It does not mean the owner. Ownership involves a question of title, whereas possession does not. The words "claiming to be entitled to possession" do not mean that the claims must necessarily be made at the conclusion of the inquiry or trial. The Court can consider the claims on the basis of evidence which is already before him in the case.

6. In the case at hand, there is material to show that the licence and gun were seized from the accused as is evident from the Exts. 3 and 4. An order of confiscation or property should not be made without hearing the person likely to be affected and prejudiced by the order of confiscation. It is true that the Section does not require in terms issue of a notice, but when an order is likely to

prejudice a person in a proceeding, the affected person should be granted an opportunity of being heard. Elementary rules of natural justice cannot be overlooked or ignored in exercise of discretionary powers. It appears that there was no bearing on the question of disposal of the property. Though it may not be necessary in all cases, yet in a case like the one at hand where there are materials to show that the gun was seized from the accused/appellant, but there exist materials justifying confiscation, the affected person should be heard. What may have stood on the way is the answer given to question No. 15 in the statement recorded u/s 313 of the Code. The learned trial Judge should have granted an opportunity to the appellant to place his case for consideration.

7. The direction for confiscation is accordingly set aside. The learned trial Judge shall pass a fresh order upon hearing the parties. It is made clear that I have not impressed any opinion about the merits of the case.

The appeal is disposed of accordingly.