
(2020) 01 JH CK 0237
In the Jharkhand High Court
Case No : Criminal Revision No. 70 Of 2014

Baiznath Yadav And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 17-01-2020

Acts Referred:

Indian Penal Code, 1860 — Section 120B, 379, 414
Electricity Act, 2003 — Section 39, 44
Code Of Criminal Procedure, 1973 — Section 100, 100(4)

Citation : (2020) 01 JH CK 0237

Hon'ble Judges : Deepak Roshan, J

Bench : Single Bench

Advocate : Rishi Pallav, Shiv Shankar Kumar

Final Decision : Allowed

Judgement

1. The instant application is directed against the judgment dated 03.01.2014, passed by the learned District and Additional Sessions Judge-II, Chatra, in

Criminal Appeal No.62 of 2009, whereby the appeal preferred by the petitioners has been dismissed and the judgment of conviction and order of

sentence dated 04.12.2009, passed by the learned Judicial Magistrate 1st Class, Chatra in Simaria P.S. Case No.44 of 2005, corresponding to G.R.

No.373 of 2005, T.R. No.376 of 2009, whereby the petitioners have been found guilty for the offence under Section 414 of the Indian Penal Code and

were directed to undergo R.I. for 03 years with fine of Rs.2,000/- each and in default of payment of fine, they were further directed to undergo S.I.

for three months, has been affirmed.

2. The Prosecution case in short is that one Awadhesh Kr. Singh, Officer-In-charge of Simaria P.S gave an application to the Chief Judicial

Magistrate stating therein that on the same day when he along with armed police force, CRPF and Assistant Commandant-Sri Kunal under the

leadership of S.D.P.O-Sri Binay Bharti conducted raid against extremist and happened to reach at village Khaira at 8.00 am, they received

confidential information that Baidnath Yadav, Sahdeo Yadav, Mahadev Yadav, Puran Singh @ Puran Ganjhu, Bahdhan Ganju, Sarju Sao, Jawahar

Sao, Inder Munda @ Soma Munda, Manoj Oraon, Niranjana Urao and Arjun Ganjhu along with 25-30 unknown persons at the instance of the extremist

were cutting electric aluminum wire of Gaya-Patratu line and on such information, raids were conducted in the respective houses of Bajinath Yadav,

Sahdeo Yadav, Suraj Sao and Mahadev Yadav and on their instance several quintals of Aluminum wires were recovered and seized. Thereafter the

police force in presence of two witnesses, namely Arjun Sao and Jagernath Kumar Sao also seized 23 quintals of aluminum wire concealed in the field

covered by deep forest. Accordingly, FIR was instituted against 11 accused persons including petitioners.

3. The learned trial court after dealing with the evidences, both oral and documentary, convicted the petitioners for the offence under Section 414 of the IPC and acquitted the co-accused from the said charges.

The learned trial court while convicting the petitioners held as under:-

“Under such circumstances all the accused persons are not found and held guilty for the offence under Section 379 and 120B of the

IPC. Hence, all the accused persons are acquitted thereunder accordingly. So far the charges for the offence under Section 39 and 44 of

Indian Electricity Act are concerned the materials on record does not show that the accused persons dishonestly abstract, consumes or uses

any energy and it is also not proved that the accused person have interfered with the matters or licensee works and for improper uses of

energy. According to the provision of both sections the ingredients mentioned in these two sections have not been proved against the

accused persons. Hence, I also found that the prosecution did not prove the charges under Section 39 and 44 of Indian Electricity Act

against the accused persons. Therefore, all the accused persons are acquitted under these two sections also. Bailer of these six acquitted

persons are discharged from the liabilities of their bail bonds.

But on the above discussions of the facts I come to the conclusion that the huge quantity of aluminium wire which are a stolen property

have been concealed and kept under the conscious possession of accused Baijnath Yadav and Sahdeo Yadav son of Bhola Yadav and these

facts have been proved by the evidence of P.W.-1 who is the member of raiding party and I agree with the view of State that non-

examination of the I.O informant and other witnesses did not fatal the case of prosecution, P.W.-2 has also supported the facts of the case.

In the circumstances, I find that prosecution has been able to prove the charge under Section 414 of the IPC against these two accused

persons. Hence, both the accused persons, namely, Baijnath Yadav and Sahdeo Yadav are found and hold guilty for the offence under

Section 414 of the IPC onlyâ??.

4. Being aggrieved, the petitioners challenged the aforesaid order before the learned District and Additional Sessions Judge-II, Chatra, whereby the

appeal preferred by them was dismissed and the learned appellate court concurred with the finding given by the learned trial court.

5. Learned counsel for the petitioner submits that out of 20 charge-sheeted witnesses only two witnesses were examined on behalf of the prosecution.

Moreover, these two witnesses were also member of the raiding party and further their depositions are full of contradictions. Learned counsel further

contended that Investigating Officer has not been examined in this case, as such, it cannot be said that place of occurrence has been proved. The

learned trial court further erred in appreciating the fact that even the seizure list witnesses have not been examined. In nutshell, no independent

witness has been examined to prove the guilt of the petitioners. It is an admitted case of prosecution that the aluminum wires were recovered from the

different places within the periphery of 50 meters. However, only the petitioners have been found guilty and rest of the persons have been acquitted.

It has also been contended by the learned counsel for the petitioners that the said aluminum wire has not been proved as stolen property as the alleged

theft report has not been proved. He concluded his argument by submitting that though it is a settled principle that non-examination of the Investigating

Officer is not fatal to the prosecution case but in the instant case, non-examination of I.O is highly prejudicial to the petitioners. This is clear cut case

of acquittal, however, both the courts below have not appreciated the case in correct perspective.

6. Per-contra, learned APP supports the impugned judgments and submits that there was a theft report by Arun Kumar, Assistant Engineer and huge quantity of aluminum wire were recovered from the conscious possession of the petitioners. Learned APP further contended that the petitioners cannot take the ground of equality in a criminal case rather the learned trial court has meticulously appreciated the evidences and acquitted the co-accused and convicted the petitioners only.

7. Heard learned counsel for the petitioners and learned APP for the State.

8. On scrutiny of the entire material on record, I find that the conviction is based on the testimony of two witnesses only, who were the member of raiding party. It is true that there was a report of one Arun Kumar, Assistant Engineer, Electricity Department, who lodged an F.I.R regarding theft of electrical wire, however, the said Arun Kumar has not been examined. Further, P.W.-1 has categorically admitted that he is not sure whether the seized aluminum wire is in connection of the same F.I.R being Simaria P.S. Case No.6 of 2005. The record further transpires that P.W.-2 has categorically admitted in para-2 of his cross-examination that he is unable to say from which house the articles were seized. Para-2 of the cross-examination of P.W.-2 is quoted herein below.

The record further transpires that no independent witness has been examined. It is settled principle of criminal jurisprudence that in the case of search and seizure, examination of independent witness is very important. It is true that non-examination of I.O is not fatal to the prosecution case. The

Honâ??ble Supreme Court in the case of Behari Prasad Vs. State of Bihar reported in 1996 SCC (2) 31 7has held that non-examination of

Investigation Officer is not fatal to the prosecution case specially when no prejudice is likely to be suffered by the accused. In the instant case it is

specific case of prosecution that the aluminum wires were seized from different places within periphery of 50 meters, as such, in the instant case in

my considered opinion the non-examination of Investigating Officer does prejudice to the accused specially in the background that the co-accused

have been acquitted and articles were seized from different places and under such circumstances, the different place of occurrence ought to have

been proved by the I.O.

Honâble Karnataka High Court in the case of Hirianna Shetty Vs. State of Mysore has held in paragraph-9 and 10 after relying several judgments

as under:-

â9. 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 Santhosh, 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 brine 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.

10. Thus in my opinion, the non-examination of the Investigating officer in the case is a serious infirmity resulting in prejudice to the

accused and therefore, the conviction and sentence passed against him are liable to be set asideâ?.

The other aspect of the matter is that admittedly the seizure list witnesses have not been examined. The Honâble Apex Court in the case of M.P.

Sharma Vs. Satish Chandra reported in 1954 AIR 300, has held that the provision of Section 100 of Cr.P.C. need to be complied with while exercising

search and seizure. Recently, Honâble Patna High Court in the case of Ranjan Kumar @ Raju & Ors. Vs. State of Bihar, reported in 2018 (2)

PLJR 274 had also held as under:-

ânon-examination of the seizure list witnesses creates doubt with regard to

recovery of firearms from possession of the appellants. The evidence of seizure list witnesses is very crucial for prosecution to prove the genuineness of search and seizure. Moreover, the non-examination of Patna High Court CR. App (SJ) No.20 of 2007 dated 30.11.2017 the seizure list witnesses definitely creates doubt over the prosecution case is required under Section 100(4) of the Cr.P.C.??.

9. The learned trial court has convicted the petitioners on mere surmises and conjecture and only on the deposition of P.W.-1. The learned trial court should have appreciated that no independent witness has been examined and even the theft report made in Simaria P.S. Case no.06/2005 has also not been proved. In my considered opinion, the learned trial court has committed an error ignoring the settled proposition of law with respect to compliance of Section 100 of Cr.P.C. in the case of search and seizure. Even the learned appellate court failed to appreciate all these issues in concurring with the findings with the learned trial court.

10. In view of the aforesaid facts and discussion and the judicial pronouncement, the judgment dated 03.01.2014, passed by the learned District and Additional Sessions Judge-II, Chatra, in Criminal Appeal No.62 of 2009 and the judgment dated 04.12.2009, passed by the learned Judicial Magistrate 1st Class, Chatra in Simaria P.S. Case No.44 of 2005, corresponding to G.R. No.373 of 2005, T.R. No.376 of 2009, are hereby, set aside.

11. As a result this criminal revision application is hereby allowed.

12. The petitioners are discharged from the liability of bail bonds.

13. Let the lower court record be sent to the court concerned along with a copy of this order forthwith.