

(2004) 06 OHC CK 0016
In the Orissa High Court
Case No : Criminal Appeal No. 142 of 1988

Basanta Pradhan and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 17-06-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 380, 395

Citation : (2004) CLT 862 (Suppl CrI) : (2004) 28 OCR 686 : (2004) 2 OLR 152

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : B.M. Patnaik, N. P. Patnaik and P.C. Mohapatra, for the Appellant;
Government Advocate, for the Respondent

Judgement

P.K. Tripathy, J.—The six appellants are the convicted accused persons in Sessions Case No. 32 of 1987 of the Court of Sessions Judge, Phulbani. They were charged for the offence u/s 395 I.P.C. and convicted thereunder. Learned Sessions Judge directed each of the appellants to undergo rigorous imprisonment for three years. The said order of conviction and sentence has been challenged in this appeal.

2. As it reveals from the trial Court's record and that fact is not disputed by the parties, Late Sebakar Pradhan, deceased husband of the informant/P.W. No. 1 Radha Bewa and accused Khedu Pradhan are to agnetic brothers. Accused Basanta Pradhan and Prahalad Pradhan are sons of Khedu. Accused Gobinda Pradhan and Koibarta " Kaibarta Pradhan are agnetic cousins of said Khedu and accused Upendra Baghar is the field servant of accused Khedu. P.W. No. 2 Dasamati Karmi and P.W. No. 5 Haribandhu Karmi are daughter and son-in-law respectively of P.W. No. 1. P.W. No. 3, Sashi Pradhan is a field servant in their family and the said four witnesses are the witnesses to the occurrence.

3. According to the prosecution, in the night of 7.11.1986 at about 10 P.M. the accused persons trespassed into the house of P.W. No. 1, tied her and other inmates, i.e., P.W. Nos. 1, 2, 3 and 5 and looted the house and removed cash,

ornaments, utensils, garments and paddy and rice, etc. P.W. No. 1 got the matter reported to the police after one day of the occurrence. Police made investigation, recovered the stolen articles not only from the house of the accused persons but also from a well besides seizing some of the incriminating articles like rope, etc. from the spot. Police submitted charge sheet for the offence u/s 395, Indian Penal Code and, as noted above, the appellants faced the trial on the said charge.

4. In course of the trial, prosecution relied on the oral evidence of the above noted four eye-witnesses. Prosecution also relied on the evidence of P.W. No. 4, the doctor who examined P.W. No. 1 and granted her the injury certificate, two post-occurrence witnesses, i.e., P.W. Nos. 7 and 8 and the official witnesses, i.e., P.W. Nos. 9 and 10. Prosecution also relied on the F.I.R. Ext. 2, the Injury Report, Ext. 1 and the seizure lists u/s 27, Cr.P.C., or otherwise, vide Exts. 3, 5 and 6 and the zimanama, Ext. 4. In course of the trial, the stolen properties recovered in course of investigation were identified by P.W. Nos. 1 and 2 and they have been marked as Material Objects. It also appears from the impugned judgment and the trial Court's record that while pleading complete denial to the charges, accused persons claimed the seized articles such as some of the gold ornaments and garments like sarees to be belonging to the female members in the house of the accused Khedu Pradhan. They also advanced the plea of false implication because of the family dispute. However, the accused persons did not adduce any defence evidence.

5. On analysis of the evidence on record, the trial Court found that not only the victims-cum-eye witnesses to the occurrence, viz., P.W. Nos. 1,2,3 and 5 have stated and proved on record that dacoity was committed in their house and the stolen but identified properties were removed from their house but also in that respect the evidence of P.W. Nos. 7 and 8, two witnesses hostile to the prosecution, also supports to the stand of the prosecution. Trial Court also found that the properties identified in course of the trial have been proved to be belonging to P.W. No. 1 and when the seizure is not disputed, the plea of the accused that such properties belong to their family has remained not proved. Accordingly, while accepting the case of the prosecution relating to search leading to discovery and seizure of different articles and that such articles were recovered from the possession of the accused persons and that such articles belong to P. W. No. 1, the trial Court recorded the finding that such properties looted in the dacoity and recovered from the accused proves their guilt for the offence punishable u/s 395, Indian Penal Code Learned Sessions Judge recorded the finding that no doubt the family of the informant and the accused Khedu Pradhan are close relations, but the prosperity which the informant earned by dint of their labour caused jealousy with the family members of the accused Khedu and they committed the aforesaid offence. Accordingly, learned Sessions Judge did not find existence of enmity as a ground to reject the prosecution evidence on the basis of proved facts. Learned Sessions Judge did not find it to be injurious to the prosecution for the reason of one day's delay in lodging the F.I.R. on the ground that P.W. No. 1 has explained that after the shocking

incident she took time to recover from the same and thereafter lodged the F.I.R. and such explanation is plausible and acceptable. Learned Sessions Judge also did not find anything to grant benefit of doubt to accused Khedu Pradhan and Upendra Baghar for the reason of their names being not mentioned in the F.I.R. He considered that to be a mere lapse and not to grant any benefit arising out of the same in favour of the said two accused persons.

6. Though the appellants have taken various grounds while challenging to the impugned order of conviction but at the time of argument learned Counsel for the appellants argued that:

(i) when P. Ws. Nos. 6 and 7 have not supported the prosecution, that evidence should not have been ignored being favouring the accused;

(ii) when there was no T.I. Parade of the stolen articles and particularly the ornaments, no credibility should have been granted to the evidence of P.W. Nos. 1 and 2 relating to their identification in Court; and

(iii) when the names of the accused Khedu and Upendra are conspicuously absent in the F.I.R., the Court below should have given due importance to that aspect for granting benefit of doubt in their favour.

On the basis of the aforesaid argument he also advanced an alternative argument that, in the event the aforesaid two accused persons are excluded, then the involvement as per the prosecution allegation remains confined to four accused persons and therefore, it does not make out to be a case u/s 395, I.P.C. He further stated that by the date of the trial accused persons were respectively 32, 17, 70, 40, 31 and 25 years old. By lapse of time of near about a half a decade in the meantime they have already advanced in age sufficiently and therefore, this Court may consider that circumstance in the event of maintaining the order of conviction for any order offence other than the offence punishable u/s 395, I.P.C.

7. Learned Counsel for the State while supporting to the impugned judgment, argued that P.W. Nos. 6 and 7 being not the eye-witnesses to the occurrence and they were declared hostile by the prosecution, therefore, their evidence in the cross-examination is of no relevance to adjudicate the dispute. He further argued that when the identity of the ornaments is not in dispute, when accused claims ownership over the said ornaments and therefore does not dispute to the seizure list, therefore, lack of T.I. Parade does not render to the prosecution to be unreliable. He supports the reasons assigned by the trial Court relating to the omission of the names of two accused persons. viz., Khedu Pradhan and Upendra Baghar and argues to maintain the order of conviction.

8. On perusal of the evidence on record, the findings recorded by the trial Court and considering the aforesaid argument advanced by the parties, this Court finds that so far as the omission of names of accused Khedu and Upendra in Ext.2 (F.I.R.), it was very lightly dealt with by learned Sessions Judge without keeping

the admitted position of hostile relationship and there being delay of one day in lodging the F.I.R. Admittedly, Khedu, a man aged 70 years by then is the head of the accused's family. Rather the hostility exists between said Khedu and P.W. No. 1. The other accused persons, as it appears, only supported Khedu being their Karta and senior. Therefore, if in the night of occurrence Khedu would have gone to the house of P.W. No. 1, then she could not have missed his name to be noted in the F.I.R. Similarly, accused Upendra being the field servant in the house of the accused and a person well known to P.W. No. 1 she could not have missed to mention his name in the F.I.R. and more so when the F.I.R. was prepared about one day after the occurrence. Even the explanations which learned Sessions Judge has noted in the impugned judgment that such omission is not fatal, could have been accepted if P.W. No. 1 in course of her evidence would have explained that due to forgetfulness she omitted to mention the names of those two accused persons. When the prosecution put forth the case before the trial Court it had all the facts, all the circumstances and all the documents besides all the witnesses at its command. A person of the stature like the Public Prosecutor, who is presumed to be a competent law knowing person was conducting the sessions case. Therefore, notwithstanding all such facts and circumstances when prosecution has not come forward with any explanation through the mouth of P.W. No. 1 relating to a plausible reason for omission of the names of the said two accused persons, therefore, a doubt which arises on the genuineness of the implications of the said two persons that should go in favour of the said two accused persons. Accordingly, benefit of doubt is granted to accused Khedu Pradhan and Upendra Baghar and they are acquitted from the charge u/s 395, Indian Penal Code. The impugned judgment of conviction is, therefore, set aside against the Appellant so far as the offence u/s 395, I.P.C. is concerned, in as much as the crime alleged to have been committed by the named four accused persons may amount to theft or robbery but not the offence of dacoity.

9. So far as participation of the other four accused persons relating to the occurrence of removal of movables from the premises of P.W. No. 1 has remained proved, it can be said to be a case of robbery if there is proof on record that while committing theft the accused persons voluntarily caused or attempted to cause hurt or wrongful restraint. In that respect the trial Court has relied on the evidence of P.W. No. 4, the doctor as corroborating to the evidence of P.W. No. 1 relating to tying the hands of the inmates in the house of P.W. No. 1. The Injury Certificate, Ext.1 only indicates that there was some bruises around the wrist of P.W. No. 1. There is not a scrap of paper to show or suggest that P.W. Nos. 2, 3 and 5 sustained any injury in course of that occurrence. Therefore, that suggests that though the accused persons looted the property, they did not suffer any resistance, may be due to fear and apprehension by P.W. No. 1 and the other inmates. When the evidence on record does not logically prove the circumstance of causing wrongful restraint to the aforesaid witnesses or causing injury to them, therefore, the allegation made by the said witnesses does not amount to the offence of robbery. On the other hand, since theft was committed in the human

Swelling house of P.W. No. 1, therefore, that squarely makes out the offence of theft punishable u/s 380, Indian Penal Code

10. In that context, the other contentions raised by the Appellant is considered. So far as the question of P.W. Nos. 6 and 7 giving evidence in favour of the accused persons is concerned, as rightly recorded by the trial Court, such evidence is not worthy of credence when those two witnesses, for not supporting to the prosecution, were declared hostile and leading questions were put to them. Apart from that, as rightly noted by the trial Court, those two witnesses admitted about the factum that the occurrence took place in the occurrence night but they were not eye-witnesses to the occurrence. When that is the substance of their evidence in the examination-in-chief, the further evidence brought on record in course of the cross-examination, may be by the defence, is a self-serving one and not to be relied upon.

11. As rightly argued by learned Counsel for the State, when the accused persons do not dispute to search, recovery and seizure of the articles including the ornaments and garments, therefore, the accused persons do not get any advantage to wriggle out from the crime simply because the movable properties were not put to T.I. parade till the time of trial and when nothing has been brought on record by the accused persons to claim prejudice for non-conducting of T.I. parade by the investigating agency. This Court does not know the reason nor intends to find out the same at this stage as to why the investigating agency did not take steps for T.I. parade of the seized articles. It should have been done by that agency. Be that as it may, not conducting T.I. parade particularly in this case and because of the aforesaid defence plea of the accused persons, accused persons are not entitled to acquittal only because of non-conducting of T.I. parade when admittedly the accused persons have not brought on record any circumstance so as to claim prejudice for not conducting such T.I. parade. In view of that, while accepting the argument of the prosecution, this Court finds no merit in that contention raised on behalf of the appellants.

12. From the aforesaid analysis of the facts and circumstances and the findings recorded, this Court finds that even if the four accused persons are not liable to be convicted u/s 395, I.P.C. or 392, I.P.C. but the evidence on record makes out a case u/s 380, Indian Penal Code. against the above mentioned four accused persons (i.e., accused/Appellant Nos. 1,2,4 and 5). Position of law is clear enough that a person charged for a greater offence can be convicted for a lesser offence of the same nature. Therefore, when the appellants were charged for the offence u/s 395, Indian Penal Code., they can be convicted for the offence u/s 380, Indian Penal Code. Accordingly, accused/appellants namely, Basanta Pradhan, Prahalad Pradhan, Gobinda Pradhan and Koibarta " Kaibarta Pradhan are convicted for the offence punishable u/s 380, Indian Penal Code.

So far as the sentence is concerned, offence u/s 380, Indian Penal Code. is punishable with imprisonment for a maximum period of seven years with or without fine. The offence u/s 395, I.P.C. is punishable with imprisonment for life

or rigorous imprisonment for ten years along with fine. Learned Sessions Judge, Phulbani, referring to and relying on the case of Shivappa and Others Vs. The State of Mysore, , and considering the facts and circumstances involved in the case, took a liberal view and imposed sentence of rigours imprisonment for three years. Of course, wrongly he omitted to impose fine. Be that as it may, while admitting the appeal on 16.6.1988 this Court neither considered insufficiency of that sentence nor issued notice for enhancement of sentence. As per the aforesaid findings, the conviction for the offence u/s 395, Indian Penal Code. has been set aside. From the date of occurrence (7.11.1986) a period of eventeen years have already elapsed. It also appears from the record of the S.D.J.M. Boudh that each of the convicted accused/appellants were detained in Jail custody as under trial prisoners from 12.11.1986 till 15.12.1986. Above all, this Court finds that the stolen articles were recovered and particularly the ornaments, utensils and garments can be returned to the P.W. No. 1. Thus, taking totality of all such facts and circumstances, this Court imposes sentence of rigorous imprisonment for one month to each of the aforesaid convicted accused persons for the offence u/s 380, I.P.C. and the period of detention in jail as under-trial prisoners be set off as against that sentence.

The Criminal Appeal is thus allowed in part by setting aside the order of conviction and sentence u/s 395, Indian Penal Code. against all the accused persons, but converting the order of conviction against the accused/appellants namely Basanta Pradhan, Prahalad Pradhan, Gobinda Pradhan and Koibarta " Kaibarta Pradhan for the offence u/s 380, Indian Penal Code and sentencing them in the manner indicated above.