

(2024) 03 OHC CK 0035

In the Orissa High Court

Case No : CRLMC No.3123, 3124, 2643 Of 2023

Chinmaya Mallick @ Chinmaya Kumar Mallick

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 06-03-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 232, 482

Indian Penal Code, 1860 — Section 34, 307, 395, 412, 458

Arms Act, 1959 — Section 25, 27

Citation : (2024) 03 OHC CK 0035

Hon'ble Judges : S.S. Mishra, J

Bench : Single Bench

Advocate : Satya Narayan Mishra 4, P.K. Maharaj

Final Decision : Disposed Of

Judgement

S.S. Mishra, J.

1. The petitioner has filed the afore-captioned three different cases seeking quashing of the criminal prosecutions against him on the sole ground that the co-accused persons those who have faced the trial in all the three cases have already been acquitted by the learned Trial Courts. Admittedly, the petitioner has been absconding in all the three cases. The following chart would indicate the sequence of events unfolded in the present three cases:

Details of involvement of petitioner in criminal cases and results thereof in respect of other accused persons those who have faced the trial.

Sl.

No.

Case No.

F.I.R.

Offence

CS

Arrested

Bailed

Accused

persons

Acquitted

vide order

1.

CRLMC No.3123/2023

Basudevpur

P.S. Case

No.218 dt. 21.10.2017

Section 395 IPC r/w Sections 25/27 of Arms Act

Sections 395/458/412

IPC r/w Sections 25/27 of Arms Act

16.08.2023

19.08.2023

8 accused persons

5 accused persons were acquitted vide order dated

29.06.2022

2.

CRLMC No.3124/2023

Basudevpur

P.S. Case

No.226 dt. 31.10.2017

Sections 458/394 IPC

Section 458/395 IPC

16.08.2023

19.08.2023

8 accused persons

5 accused persons were acquitted vide order dated
30.05.2022

3.

CRLMC No.2643/2023

Naikandihi

P.S. Case

No.110 dt. 26.10.2017

Sections 457/394 IPC

Section 395 IPC

16.08.2023

19.08.2023

7 accused persons

3 accused persons were acquitted vide order dated
24.04.2023

On the basis of the aforementioned common fact scenario, the individual cases are analyzed as below.

CRLMC No.3123 of 2023

2. The prosecution story in the present case runs as follows:

On 21.10.2017 at about 1.45 PM, one Suresh Chandra Jena of village Kumarpur, District- Bhadrak lodged a written report before the I.I.C., Basudevpur Police Station alleging that on 21.10.2017 at about 9.30 PM., while they were taking dinner, six persons entered into his house from back door being covered their faces. One of the accused abused the informant and snatched away his mobile phone and put a 'Bhujali' on his neck. The accused persons took away other two mobile phones. They tied the informant, his son and parents by means of a napkin. Thereafter they took away all the gold earrings, gold chain from the mother of the informant. They also took away 5 nos. of gold rings, gold chain, one pair of ear flower and cash of Rs.15,000/- from the room of the father of the informant. The informant alleged that one of the accused person was armed with 'Bhujali' and another was holding 'Gun' and rest accused persons were holding 'Knives'. Thereafter, the informant lodged the F.I.R. against the accused persons in Basudevpur Police Station. Accordingly, I.I.C., Basudevpur Police Station registered F.I.R. in Basudevpur P.S. Case No.218 of 2017 against the accused persons.

3. Out of total eight accused persons, five accused persons were arrested and subjected to trial.

4. Learned Assistant Sessions Judge, Basudevpur, District-Bhadrak, vide its judgment dated 29.06.2022 had recorded an acquittal in favour of five accused persons. The prime ground for recording acquittal in favour of those accused persons are that the gold ornaments seized from the possession of the accused were subjected to T.I. Parade and the ownership could not be established. Learned trial Court has also recorded that in the said case, no offensive weapons have been seized from the possession of the accused persons, though the allegation was that the accused persons have used 'Bhujali', 'gun' and 'knife' for committing the crime. Therefore, learned trial Court had recorded acquittal in favour of five accused persons.

CRLMC No.3124 of 2023

5. In this case, there were eight accused persons, out of whom, five accused persons were apprehended and including the petitioner, three accused persons were absconded.

6. The prosecution against five accused persons, inter alia, alleged that on 31.10.2017 at about 2.30 PM, one Santanu Kumar Jena of village Chandanpur, District- Bhadrak lodged a written report before I.I.C., Basudevpur Police Station alleging therein that on the previous night at about 10.00 PM, while he was watching T.V., two miscreants entered into his house being armed with 'Bhujali' by covering their faces. By showing 'Bhujali', the accused persons tied his son and wife. Thereafter, the accused persons took away the gold ornaments, 2 nos. of ATM cards and cash of Rs.15,000/- by breaking the godrej almirah. The informant lodged the F.I.R. against the accused persons in Basudevpur Police Station. Accordingly, the I.I.C., Basudevpur Police Station registered F.I.R. in Basudevpur P.S. Case No.226 of 2017 against the accused persons.

7. Learned Assistant Sessions Judge, Basudevpur, District- Bhadrak, vide its judgment dated 30.05.2022 had recorded an acquittal in favour of five accused persons. The ground of acquittal primarily was that, though the accused persons were arrested on 26.11.2017, the Investigating Officer had conducted T.I. Parade of those accused persons only on 19.03.2018 after a delay of 111 days. The delay this caused has not been explained. Therefore, the T.I. Parade was doubted. The gold ornaments alleged to have been stolen in the case and recovered from the accused persons also could not be proved. Therefore, five accused persons set to trial were acquitted.

CRLMC No.2643 of 2023

8. In this case, there were seven accused persons. The prosecution case in nutshell as projected in F.I.R. is that the informant namely Biswanath Swain lodged an F.I.R. at Naikanidihi Police Station on 26.06.2017 at 11.29 AM alleging therein that on 25.06.2017 night at about 8.15 AM, three unknown persons covering

their faces being armed with deadly weapons i.e. 'Knife' and 'Bhujali' entered into his house and assaulted him. When his wife protested, they snatched away her mobile, tied her hands and legs and by threatening to kill them and took away the gold ornaments and cash breaking the almirah and confined them in a room by locking from outside. On receiving such allegation, in absence of the then O.I.C., Naikanidihi Police Station, S.I. of Police Kulamani Patra registered the F.I.R. in Naikanidihi P.S. Case No.110 of 2022 against the accused persons.

9. On the basis of the aforementioned acquittal orders have been passed by the learned trial Courts in all the three cases in the separate trial qua the accused person. The present petitioner seeks quashment of all the three cases qua him seeking parity with the accused persons who all are acquitted.

10. I have perused the case records in all the above three cases and found that the petitioner is a deliberate absconder and was absconding till the outcome of the trial of the other accused persons. The evidence adduced by the prosecution in all the three cases are qua the accused persons set for trial. The primary ground for acquittal in all the three cases are because of the faulty T.I. Parade conducted by the Investigating Officer and non-proving of the seized gold ornament. Since the present petitioner has been absconding in all the three cases, question of subjecting him to T.I. Parade does not arise. Therefore, the ground of acquittal of the co-accused persons in so far as doubtful T.I. Parade is concerned, shall not enure to his benefit. In so far as non-proving of the ownership of the recovered gold ornaments are concerned, it is pertinent to mention here that apart from the gold ornaments, various other articles were allegedly stolen by the accused persons. Since the petitioner has been absconding, obviously nothing was recovered from him. The recovery was affected from the accused persons who were subjected to trial and the said recovery could not be proved by the prosecution.

Therefore, the benefit was extended to those accused persons. The petitioner cannot derive benefit of the same. As per the prosecution, all the accused persons were attributed separate overt act in committing the crime. Accused persons were armed with deadly weapons. Therefore, who was holding which weapon and what is recovered from which accused is definitely material to the case. There cannot be any recovery from the absconding accused, therefore, the role of the absconding accused needs to be ascertained from trial.

11. Mr. Satya Narayan Mishra (4), learned counsel has appeared for the petitioner and relied upon the judgment in the case of Satyaban Pradhan @ Kuna Pradhan vs. State of Odisha passed in Criminal Misc. Case No.4441 of 2015 reported in (2016) 63 OCR 87 and submits that this Court in similar case has given indulgence and quashed the criminal prosecution. He has relied upon para-6 of the said case which reads as under:

"6. In applying the principle laid down in the aforesaid cases, this Court finds that the main accused Madhab Chandra Sahoo, who had allegedly assaulted the

informant on his face by means of a stone with an intention to commit his murder, has already been acquitted. The allegation against the present petitioner is that he caught hold of the informant and threw him on the ground and caught hold of him. When the prosecution could not prove the main allegation of commission of offence under Section 307 of the IPC against the co-accused and he has been acquitted of the charges under Section 232 Cr.P.C., there is hardly any possibility of proving the case under Section 307/34 of the IPC against the present petitioner. So, in this view of the material on record, this Court is of the opinion that it will be appropriate for this Court, for ends of justice and to prevent abuse the process of law to quash the proceeding against the absconding accused i.e. the petitioner in its entirety by exercising the inherent power under Section 482 Cr.P.C.”

12. The petitioner cannot derive benefit of the judgment in Satyaban Pradhan @ Kuna Pradhan (supra) because he has no parity on facts with that case. The petitioner also relies upon the judgment of the Hon’ble Supreme Court in the case of Javed Shaukat Ali Qureshi vs. State of Gujarat passed in Criminal Appeal No.1012 of 2022 reported in (2023) 9 SCC 164 and submits that if the principal accused has been acquitted, the trial against him would be a futile exercise. I have perused the said judgment. Para-19 of the said judgment reads as under:

“19. We have found that the case of accused no.2 stands on the same footing as accused nos.1, 5 and 13 acquitted by this Court. The accused no.2 must get the benefit of parity. The principles laid down in the case of Harbans Singh will apply. If we fail to grant relief to accused no.2, the rights guaranteed to accused no.2 under Article 21 of the Constitution of India will be violated. It will amount to doing manifest injustice. In fact, as a Constitutional Court entrusted with the duty of upholding fundamental rights guaranteed under the Constitution, it is our duty and obligation to extend the same relief to accused no.2. Therefore, we will have to recall the order passed in the special leave petition filed by accused no.2.”

Learned counsel for the petitioner further relies upon the judgment of the Hon’ble Supreme Court in the case of Mohd. Wajid vs. State of U.P. reported in (2023) 92 OCR (SC) 98 and submits that the continuation of the criminal case against the accused persons would be nothing but abuse of the process of law and noted that for the purpose of quashing the F.I.R. or criminal proceedings, the criminal antecedents of the accused cannot be the sole consideration. It was also added that an accused has a legitimate right to say before the Court that howsoever bad his antecedents may be, still if the F.I.R. fails to disclose commission of any offence or his case falls within one of the parameters as laid down by the Court in the case of Bhajan Lal (supra), then the Court should not decline to quash the criminal case only on the ground that the accused is a history - sheeter.

In so far as Mohd. Wajid (supra) case is concerned the said case was regarding quashment of the F.I.R. On the basis of non- disclosure of any offence from the perusal of the case initiated against the petitioner. Therefore, the Hon’ble

Supreme Court has said that on the ground of criminal antecedent, the quashing petition should not be turned down without looking into the merits of the case.

13. Perusal of the aforementioned passage indicates that acquittal of the co-accused persons would enure to the benefit of the petitioner, if he could establish parity with the acquitted accused persons. However, in the instant case, the petitioner is involved in three cases and he has been absconding. Therefore, he cannot draw parity with the facts of the cases he has cited.

14. Finally, the petitioner has relied upon the judgment of the Allahabad High Court in the case of Anant Mishra @ Amit Mishra @ Surya Prakash Mishra vs. State of U.P. and Another in an Application U/S 482 No.1325 of 2021. He has relied upon para-6 of the said judgment which reads as under:

"6. If two persons are prosecuted, though separately, under the same charge for offences having been committed in the same transaction and on the basis of the same evidence, and if one of them is acquitted for whatever may be the reason and the other is convicted, then it will create an anomalous position in law and is likely to shake the confidence of the people in the administration of justice. Justice is not only to be done but also seem to be done. Therefore, I am clearly of opinion that as has been held in the case of Pritam Singh v. State of Punjab. (S) AIR 1956 SC 415, the principle of stare decisis will apply in the present case and the applicant's conviction cannot be sustained."

After going through the judgments relied by learned counsel for the applicant, it is very much clear that Court has held that considering the testimony of witnesses, if one accused is acquitted, no criminal proceeding can be sustained against co-accused on the same set of witnesses and in the present case too, there is no separate witness and on the basis of testimony of same prosecution witnesses, main accused was acquitted by the court below, whenever there is no prospect of the case ending in conviction, valuable time of court should not be wasted for holding trial only for the purpose of completing the procedure to pronounce the conclusion on future date. Therefore, criminal proceeding cannot be permitted to continue against the applicant."

15. In the aforementioned case, there were two accused persons and both of them were similarly situated. Therefore, acquittal of one accused person enure to the benefit of the other.

16. However, the facts scenario of the present case is completely different. Moreover, the petitioner is involved in three cases. The co-accused persons in all the three cases were acquitted on the ground that the prosecution could not prove the case beyond reasonable doubt on the strength of evidence adduced vis-à-vis those accused persons.

17. The acquittal of all the accused persons are centered on the lack of evidence adduced by the prosecution regarding the recovery and non-identification of the recovered articles from the accused persons.

Apart from that, the T.I. Parade was not appropriately conducted. Therefore, it could be safely inferred that the evidence adduced by the prosecution though was insufficient to secure conviction against the accused persons, but definitely those evidences were vis-à-vis the accused persons those who have faced the trial.

It is an admitted fact that the petitioner has been an absconder in all the three cases. Therefore, there was no occasion for the investigating agency to affect any recovery from the petitioner and there was no occasion for the police to subject the petitioner to T.I. Parade.

In that view of the matter, the inevitable conclusion is that the prosecution should get opportunity to lead evidence qua the present petitioner so as to establish the guilt of the petitioner.

In view of the aforementioned facts, I am not inclined to quash the criminal prosecutions against the petitioner in all the three cases. However, I am of the view that the learned Trial Court should do well to see that the trial of all the three cases are concluded as expeditiously as possible, because all the cases are as old as 7 years.

18. With the aforesaid observation, all the above three cases are disposed of.

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