

(1968) 11 OHC CK 0014

In the Orissa High Court

Case No : Criminal Revision No. 472 of 1966 and Criminal Appeal No. 175 of 1966

Dhruba Charan Khuntia

APPELLANT

Vs

State and Others
 Indramoni Swain Vs Dhruba Charan Khuntia and Others

RESPONDENT

Date of Decision : 19-11-1968

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 156(3), 200, 202, 417(3), 439
Penal Code, 1860 (IPC) — Section 147, 149, 323, 324, 325

Citation : (1969) 35 CLT 105

Hon'ble Judges : Patra, J

Bench : Single Bench

Advocate : B.K. Behura, D. Bhuyan, S.C. Hiswal and J. Dasa, Cr. Rev. 472/66 and R.C. Ram, in Cr. A. No. 175/66, for the Appellant; Standing Counsel and R.C. Ram in Cr. Rev. 472/66 and B.K. Behura, D. Bhuyan, S.C. Hiswal and J. Das, in Cr. A. No. 175/66, for the Respondent

Final Decision : Dismissed

Judgement

Patra, J.—The appeal and the revision petition arise out of the same incident which took place on 20-11-63 on plot Nos. 647 and 648 of Mouza Palada within Salepur P.S. These two plots of lands originally belonged to some Chamars and admittedly had been purchased by one Dhadi Mohanty about 7 to 8 years before 1963. Dhruba Charan Khuntia and his brother Guru Charan Khuntia, who are the Petitioners in or Rev. 472/66 claim that they were bhagcbasis in respect of the disputed lands under the Chamars and continued to be so under Dhadi Mohanty after the latter purchased the same and that in the year 1963, they, as usual, raised paddy on the land and on 20-11-1963 reaped the same with the help of labourers. While they were returning borne with the paddy sheaves Indramoni Swain and his nephew Nisa came to the spot and abused them. Indramoni was armed with bamboo stick and katuri and Nisa had kept a Bhujali concealed inside his clothes. Indramoni assaulted Guru Charan with a stick. When a second blow

was aimed by him at Guru Charan, the stick fell down on the ground and broke into two pieces. Guru Charan picked up one of the pieces and whisled it. Nisa immediately rushed towards him and gave two strokes with the Bhujali causing bleeding injuries on his neck, and ear.

Indramoni also assaulted him on his thigh and fled away. Guru Charan was removed to the hospital for treatment and on the very same day, F.I.R. was lodged at Salepur P.S. after due investigation G.R. Case No. 2473/63 was instituted against Indramoni Swain and his nephew Nisa u/s 323/324, Indian Penal Code. This case ended in acquittal of the accused persons and as against the order of acquittal, Dhruba Khuntia has filed Cr. Rev. No. 472/66.

2. The case of Indramoni Swain, however, is that he and his brother Bramhananda Swain were bhag tenants in respect of the disputed land under Dhadi Mohanty and were regularly paying rent to him and after his death to his widow Fulla Bewa. Three years prior to the incident on 20-11-1963, they had purchased the land from Fulla Bewa under a registered sale deed and since then they were in possession thereof in this own right. During the year 1963 they raised paddy crops on the lands. On 20-11-1963, Dhrub Khuntia and his brother Guru Charan Khuntia along with a number of labourers reaped the crops although they were not yet ripe Indramoni and his brother Bramhananda protested. On the direction of Dhruba Khuntia all his men assaulted Indramoni with lathis causing fracture and they also assaulted his brother Bramhananda with lath is and injured him with a knife resulting in incised wounds and fractures. Indramoni and Bramhananda were removed to the hospital. On the next day i.e. 21-11-1963 they lodged information at Mangalabag P.S., but as the occurrence took place within the limit of Salepur P.S., the case was transferred there for investigation. After investigation police filed G.R. Case No. 2490/63 against Dhruba and his brother Guru Charan and 8 other persons said to be this labourers u/s 147/149/323 Indian Penal Code, Meanwhile Indramoni had also filed a complaint petition regarding the same incident in Court against Dhruba, Guru Charan and 23 others u/s 147/323/325/379. Indian Penal Code and cognizance had been taken thereon (C.C. 820/63). By order dated 10-8-1964, complaint case No. 820/63 was ordered to be merged with G.R. Case No. 2490/63 with the result that G.R. Case No. 2490/63 proceeded against Dhruba, Guru Charan and 23 others and ultimately ended in acquittal of an the accused persons. After obtaining special leave from this Court u/s 417(3), Code of Criminal Procedure, Indramoni Swain has preferred Cr.A. No. 175/66 against the order of acquittal.

3. Although G.R. Cases Nos. 2473/63 and 2490/63 and were tried separately and two separate judgments were delivered by the learned Magistrate, yet in view of the fact that both the cases arise out of the same incident, Cr.A. No. 175/66 and Cr. Rev. 472/66 were heard analogously and would be governed by this common order.

4. At the outset Mr. B.K. Behura, appearing for the Respondent in Cr.A. No.

175/66 raised a preliminary objection that the appeal filed at the instance of Indramoni Swain is not maintainable as Section 417(3), Code of Criminal Procedure is not applicable to this case. His contention is that as Complaint Case No. 820/63 filed by Indramoni had been ordered to be merged with G.R. Case No. 2490/63, the case thereafter proceeded as a case instituted on police report and therefore Section 417(3), Code of Criminal Procedure has no application. In support of this contention he relied on a decision of this Court in Sudhakar Das v. Dayanidhi Mohanty 31 C.L.T. 941. It is however contended by Mr. R.C. Ram appearing for the Appellants relying on a decision of the Supreme Court in Jamuna Singh v. Bhadaai Shall 1964 S.C.D. 103, that in the circumstances of the present case the identity of the complaint case filed by him in the Court should not be deemed to have been lost at all and the order of acquittal passed in G.R. Case No. 2473/63 should be deemed to have been passed in a case instituted on a private complaint and consequently application of Section 417(3), Code of Criminal Procedure is attracted. Section 417(3), Code of Criminal Procedure provides that if an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court. There is no dispute that in the present case the Court has granted special leave to Indramoni to file the appeal. When a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence such case is one instituted on a private complaint. When the Magistrate takes cognizance of an offence upon a report in writing of such facts made by any police officer, it is a case instituted on a police report.

Section 200, Code of Criminal Procedure says that a magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. Therefore, whenever on receipt of a complaint petition the Magistrate examines the complainant on oath it follows that he did so after taking cognizance of the offence. On receipt of a complaint the Magistrate is not bound to take cognizance of the offence. He can without taking cognizance direct an investigation of the case by the police u/s 156(3), Code of Criminal Procedure and after such investigation if the police submits a charge-sheet and the Magistrate thereafter takes cognizance of the offence it would be a case where cognizance had been taken on a police report notwithstanding the fact that a complaint petition had initially been filed before the Magistrate. In the present case, however, the Magistrate on receipt of the complaint petition took cognizance of the offence recorded in the statement of the complainant u/s 200, Code of Criminal Procedure on 31-1-1964 and from then on till 10-8-1964 the case proceeded as a complaint case when it was ordered to be merged with G.R. Case No. 2490/03. The case thereafter proceeded as G.R. Case No. 2490/03 and an order of acquittal was recorded

therein. The facts of the Case reported in *Jamuna Singh v. Bhadai* Shall 1964 S.C.D. 103 are different. There one Bhadai filed a petition of complaint in the Court of the S.D.M. Gopalganj on 22-11-1956. The Magistrate after examining him on solemn affirmation made an order asking the S.I. of police to institute a case and report. Ultimately a charge-sheet was submitted by the police and the accused persons were committed to the Court of Sessions and they were tried in the Sessions Court and acquitted. Against that order of acquittal Bhadai filed an appeal u/s 417(3), Code of Criminal Procedure in the High Court which set aside the order of acquittal and convicted the accused persons. Against that order of conviction the accused persons filed an appeal in the Supreme Court and this main contention was that the appeal filed by Bhadai Shall in the High Court was not maintainable. The Supreme Court held that it was clear from the fact that on receipt of the complaint the Magistrate examined the complainant u/s 200, Code of Criminal Procedure that he had taken cognizance of the offence. Thereafter it was open to him to order investigation only u/s 202, Code of Criminal Procedure and not u/s 156(3), Code of Criminal Procedure. In the circumstances this Lordships held that though the Magistrate used the words "for instituting a case" in his order dated 22-11-1956 he had actually taken action u/s 202, Code of Criminal Procedure that being the only section under which he was legally entitled to act and that the fact that S.I. treated the copy of the petition of complaint as F.I.R. and submitted a charge-sheet against the accused persons cannot make any difference. Cognizance having already been taken by the Magistrate before he sent the petition to the police for enquiry, there was no scope for cognizance being taken afresh of the same offence after the police officer's report was received. In these circumstances, the learned Judges held that the case which ended in acquittal of the accused persons must be deemed to be one instituted on private complaint and that consequently Section 417(3), Code of Criminal Procedure applied. On facts therefore the Supreme Court case is distinguishable. In that case this Lordships had not to deal with the amalgamation of two parallel proceedings one based on a private complaint and the other on a police report.

5. In the case of *Sudhakar v. Dayanidhi* 31 C.L.T. 941 the complainant first lodged F.I.R. in the police station regarding alleged theft. As there was some delay in completing investigation he filed a complaint petition in the Court of the S.D.M., Bhubaneswar a few days thereafter. The Magistrate examined the complainant on oath. But as it was disclosed that a F.I.R. had already been lodged, he asked the officer in charge to submit a report. As there was considerable delay in receipt of the said report, the Magistrate on the basis of the previous complaint summoned the accused persons u/s 411, Indian Penal Code. The police thereafter submitted a charge-sheet and the Magistrate directed that the G.R. case should be clubbed with the complaint case. This case ended in acquittal whereupon the complainant filed an appeal after obtaining leave u/s 417(3), Code of Criminal Procedure. On an objection raised that the appeal is not maintainable, Das, J. held that when both the complaint case and police case

cannot proceed side by side in respect of the very same offence, the proper course would be to proceed with the G.R. Case alone and not with the complaint case with the result that the complaint case would lose its identity and give way to the police case. That being the position the complainant would not be entitled to file an appeal u/s 417(3), Code of Criminal Procedure. That is also the view of the Patna High Court. A Division Bench of that Court in Harbans Singh Vs. Daroga Singh and Others, held that where a complaint case is amalgamated with a case instituted on a police charge-sheet the effect of the order of amalgamation is that the complaint case is merged with the police case, and loses its identity and separate existence. It cannot thereafter be said that the case is one instituted upon complaint within the meaning of Sub-section (3) of Section 417, Code of Criminal Procedure. It may be stated that in the Patna case the complainant was found absent on a particular date whereupon the Magistrate passed the order that the complaint case be amalgamated with the police case. In the Orissa case too the complainant was found absent on a particular date, but that was some time after, the Magistrate ordered that both the cases should be clubbed. But the fact that the complainant had lost, interest in the case instituted by him either before or after the amalgamation order was passed does not appear to have influenced the decision either in the Patna case or in the case in this Court that after such amalgamation the complaint case loses its identity in the G.R. Case and that what proceeds after amalgamation is only the G.R. Case. True it is that, there is no provision in the Code of Criminal Procedure for amalgamation of the one case with another. The effect of the order of amalgamation passed in the case is that thereafter there would be on separate evidence to be adduced in the complaint case and the result of the complaint case is to be the same as that of the police case. Whether in such circumstances it is permissible to order that the G.R. case would be merged in the complaint case or not, is a question that has not arisen for consideration in this case and it is therefore not necessary to express any opinion. The specific order passed by the learned Magistrate in the complaint case, as I have stated already, is that the complaint case would be merged with the G.R. case. Apparently the complainant had not taken any exception to this order. The question the Supreme Court had to consider in *Jamuna Singh v. Bhadaai* Shall 1964 S.C.D. 103 is different from the one which arises for consideration in this case and as such that decision is of no assistance to Mr. R.C. Ram. The point for consideration in this case is identical with those which arose in *Harbans Singh Vs. Daroga Singh and Others*, and *Sudhakar Das v. Dayanidhi Mohanty* 31 C.L.T. 941 and I agree with the view the learned Judges had taken in those cases. It therefore follows that Criminal Appeal No. 175/66 is not maintainable. In the circumstances, I would treat this appeal as a Revision petition.

6. It is true that it is open to a High Court in Revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal, but this jurisdiction should be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or

there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.

The Supreme Court in *K. Chinnaswamy Reddy v. State of Andhra Pradesh* 1962 S.C.D. 1004 had indicated certain instances where the High Court would be justified in interfering in Revision with a finding of acquittal; and they are:

- (i) where the trial Court has no jurisdiction to try the case but yet acquitted the accused;
- (ii) where the trial Court wrongly shut out evidence which the prosecution wanted to adduce;
- (iii) where inadmissible evidence was admitted;
- (iv) where material evidence has been overlooked by any Court; and
- (v) where the acquittal is based on compounding of the offence, which is invalid under the law.

The aforesaid circumstances are by no means exhaustive but it is said that these and other cases of similar nature can be properly held to be cases of exceptional nature where the High Court would be justified in interfering with an order of acquittal. This view is subsequently reiterated by the Supreme Court in *Mahendra Pratap Singh v. Sarju Singh* 1968 S.C.D. 238. But the High Court has no jurisdiction to reappraise the evidence and come to a different conclusion. Sub-section (4) of Section 439, Code of Criminal Procedure forbids a High Court from converting a finding of acquittal into one of conviction and that makes it an the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. Keeping these principles in view I would now proceed to consider whether the orders of acquittal passed in the two cases giving rise to the present revision applications are such as to warrant any interference u/s 439, Code of Criminal Procedure.

7. As stated already both these cases arise out of the same occurrence which took place on or near about the disputed lands on 20-11-1963. It is stated by the doctor B. Roy (p.w. 12 in G.R. Case No. 2490/63) that Indramoni (informant in G.R. Case No. 2490/63) and one of the accused in G.R. Case No. 2473/63) had three injuries on his person one of which was a fracture of the right also at the upper end of the bone. Indramani's brother Brahmananda had also fracture of both right radius and also at this middle. Injuries on both were grievous in nature which were likely to be caused by hard blunt substance such as lathi, thenga etc. Dr. B.N. Saha (d.w. 3) who was also examined for the prosecution in the counter case had found as many as 5 injuries on the person of Guru Charan Khuntia who is one of the accused in G.R. 2490/63 and 3 of the injuries were incised wounds likely to be caused by sharp cutting instrument like Bhujali and the other 2 injuries were abrasions likely to be caused by bamboo sticks. In G.R.

Case No. 2490/63 in which Indramoni was the informant and Guru Charan was one of the accused no explanation whatsoever was given by any of the prosecution witnesses as to how Guru Charan came to receive various injuries on his person. Similarly in G.R. Case No. 2473/63 in which Dhruba Khuntia was the informant and Indramoni and his nephew Nisa (son of Bramhananda,) were the accused, no explanation was offered by the prosecution witnesses as to how Indramoni and Brahmananda came to receive grievous injuries found on them. The learned Magistrate was therefore right in coming to the conclusion that in neither case the prosecution had come forward with a true picture of the occurrence as it took place. Both the parties claimed to be in possession of the land as bhag tenants and each produced rent receipts in support of this respective contentions. Although p.w.s. 2 and 8 in G.R. Case No. 2490/63 have in Court deposed that Indramoni was in possession of the land and had raised the crop during the disputed year this evidence was disbelieved because they appear to have stated before the police during the investigation that both parties were cultivating the land during the disputed year and had raised the disputed crops. In the circumstances, the learned Magistrate appears to have correctly appreciated the evidence on record in both the cases. At any rate, there do not exist any circumstance in either case to warrant interference in Revision with the orders of acquittal.

8. In the result, both Cr. Rev. No. 472/66 and Cr.A. No. 175/62 (since treated as a Revision petition) are dismissed.