
(1995) 04 OHC CK 0047

In the Orissa High Court

Case No : Criminal Appeal No's. 101, 142 and 143 of 1991 with Jail Criminal Appeal No. 197 of 1993

Fagu Das and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 21-04-1995

Acts Referred:

Evidence Act, 1872 — Section 9
Penal Code, 1860 (IPC) — Section 295, 395

Citation : (1996) CriLJ 2245 : (1995) 2 OLR 207 : (1995) 2 OLR 206

Hon'ble Judges : R.K. Dash, J

Bench : Single Bench

Advocate : Dipak Mishra, in Criminal Appeal. Nos. 101 and 142 of 1991, S.K. Panda, for B. Rath, in Criminal Appeal No. 143 of 1991 and Jayanti Mohapatra, in Jail Criminal Appeal No. 197 of 1993, for the Appellant; S.S. Rao, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.K. Dash, J.—All these four appeals arise out of judgment and order of the learned Assistant Sessions Judge, Athgarh, passed in Sessions Trial No. 140 of 1988 wherein the appellants have been convicted u/s 295, IPC and sentenced to undergo rigorous imprisonment for nine years each, and since common question of fact and law are involved, they were heard analogously and are disposed of by this common judgment.

2. The prosecution case may briefly be stated thus :

On 27-3-1986 night while Debaraj Mohanty, PW 4 and his family members were asleep, some unknown culprits armed with gun, knife, etc. forced their entry to his house and at the point of gun and knife ransacked the house and decamped with booties, such as, gold ornaments, cash, radio, clothes, etc. On a report being lodged in Athagarh Police Station a case u/s 295, IPC was registered and investigation was taken up in course of which the appellants were apprehended,

some alleged stolen articles were recovered where upon T.I. parade of persons and properties were held and on close of investigation, charge-sheet was laid against the appellants to stand their trial.

3. Plea of the appellants was one of denial and false implication. So far as T. I. parade of person is concerned, appellants grievance was that they had been shown to the witnesses by the police prior to putting them in such parade.

4. To bring home charge to the appellants the prosecution examined 43 witnesses. On the other hand, the defence in order to diminish the value of T. I. parade brought in evidence a newspaper, viz., "Samaj" in which photographs of the appellants had been published before holding of such T. I. parade. The learned Assistant Sessions Judge on an evaluation of the evidence led during trial believed the prosecution version and came to hold that appellants guilty of charge and having held thus, he convicted and sentenced them as stated earlier.

5. Learned counsel for the appellants while challenging the findings of the Assistant Sessions Judge contended, inter alia that T. I. parade of persons has lost its evidentiary value since the photographs of the appellants had been published in "Samaj" an Oriya daily, prior to holding of such parade. In this view of the matter, it would be wrong to attach importance to the said report as also the evidence of identification in the Court. So far as appellants Biranchi and Fagu are concerned, it is submitted that they had never been put in T. I. parade and only for the first time they were identified-by the witnesses in the Court. So the evidence of identification in Court having not been corroborated by a prior test identification parade, it would be unsafe to rely upon the same to hold these appellants guilty of the charge. Coming to the evidence of identification of properties, counsel submitted that since the witnesses did not identify the seized properties in Court claiming the same to be their own, no importance can be attached to the T. I. parade report to fasten any of the appellants with liability. On the other hand, counsel appearing for the State submits that findings of conviction and sentence recorded by the trial Court being based on good and sufficient reasons should not be disturbed.

6. Evidence of identification either in jail or elsewhere is relevant u/s 9 of the Evidence Act. Identification parades are held by Police in course of investigation to enable the witnesses to identify the properties which are the subject matter of offence, or to identify the persons suspected to have committed the crime. So substantive evidence of a witness is his statement in Court and the identification in the parade only lends corroboration to the said evidence. So in a case where a witness only identified a suspect in the T. I. parade but failed to identify him in the Court, no value can be attached to the T. I. parade report. Likewise law is also settled that it would be unsafe to accept the evidence of a witness regarding identification of a suspect for the first time in Court without there being prior test identification parade. In this context it would be apposite to refer to a (sic) of the Supreme Court in the case of Kanan and Others Vs. State of Kerala, where their Lordships observed as under :

"...It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T. I. parade to test his power of observations. The idea of holding T. I. parade u/s 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T. I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court....."

7. In the present case, out of nine appellants, seven, namely, Baikuntha, Gandharb, Saddhu, Nakhia alias Laxmidhar, Jatia alias Natia, Ajati alias Ajaya and Shankar were put in T. I. parade and witnesses to such parade were Debaraja Mohanty PW 4 and Prabodha Kumar Mohanty PW 7. PW 4 on being examined in the Court identified all the appellants except Ajay. So far PW 7 is concerned he implicated appellants Baikuntha, Saddhu, Gandharba, Ajay, Shankar and Fagu and identified them in the Court. Moreover, although he identified appellant Laxmidhar in the T. I. parade, but failed to identify him in Court. All these discrepancies in their evidence were not at all considered by the trial Court. On the contrary in mechanical manner the learned Assistant Sessions Judge accepted the version of PWs 4 and 7 on their face value as regards the question of identification is concerned and consequently held the appellants guilty.

8. Apart from what has been stated above, evidentiary value of the T. I. parade is also nil, the reason being that prior to holding of such parade, photographs of eight appellants had been published in a widely circulated Oriya Newspaper "Samaj" marked Ext-A. It is one of the basic requirements of law that for relying upon the evidence of identification of a suspect prosecution must establish either by direct or circumstantial evidence that the identifying witness had no opportunity to see the suspect before the identification parade was held. Usually Court looks to the evidence of identification with reasonable doubts and only when those doubts are removed, it accepts such evidence. In order to remove the doubts, the touchstone to be adopted could be (i) fair, if not good, opportunity of the witness for observation. (ii) time within which the identification was made, (iii) reliable power of observation of the witness, (iv) his credibility, and (v) the fact whether the witness got any opportunity to identify the accused after arrest. The crucial requirement is the satisfaction of the Court on the acceptability of the identification. (See Anwar v. State : AIR 1961 All 80).

9. There is another irregularity in holding the T. I. parade by the Magistrate, PW 11. His evidence, does not indicate that each suspect was mixed with the persons of similar height, complexion, colour and appearance separately for identification. Further he does not say as to the ratio of the persons mixed with the suspects. On the other hand, PW 4 in paragraph 9 of his cross-examination speaks that about 25 persons were mixed with the suspects in the parade. If this evidence is accepted the ratio comes to 1 : 3. In Asraf v. State : AIR 1961

Allahabad 153, it was held that the ratio should be 1:9 or 10 ; in other words, one suspect should be mixed up with 9 or 10 innocent persons in the T. I. parade. The said decision of Allahabad High Court has been followed by this Court in Niranjana v. State reported in (1988) 1 OCR 79. Applying the aforesaid test to the present case, I would hold that since because much, less number of persons had been mixed up with the appellants the value of identification has considerably been diminished.

10. Having excluded the evidence of identification of the appellants, there remains the evidence of identification of properties. It need be mentioned that the prosecution got identified one transistor and a pant during trial, marked M. Os. I and II. The other suspected stolen articles were although identified by some witnesses during investigation, but when were shown to the witnesses at the time of trial, they failed to identify the same. In the opinion of the learned Assistant Sessions Judge, gold and silver ornaments seized during investigation had been substituted by some other ornaments by the investigating agency. This observation of his being based on no evidence cannot be accepted. As it appears, the learned trial Court has drawn presumption in favour of the prosecution which is not supported by any legal evidence. Since the appellants were facing criminal charge, any deficiency in the prosecution case should have been used in favour of the appellants, the reason being that it is basic principle of criminal jurisprudence that an accused is presumed to be innocent. In this view of the matter, I would hold that the learned trial Court went wrong in giving ever much importance to the T. I. parade reports which ipso facto do not have any evidentiary value.

11. On a conspectus of the facts, circumstances and the evidence, I am constrained to hold that no clinching evidence could be led by the prosecution to bring home the charge u/s 395, IPC against the appellants. Consequently, all the appeals are allowed and the order of conviction and sentence passed against them is set aside. They be set at liberty forthwith, if not required in any other case.