
(1981) 08 OHC CK 0003

In the Orissa High Court

Case No : Criminal Revision No. 144 of 1980

Gangadhar Jena and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 27-08-1981

Acts Referred:

Penal Code, 1860 (IPC) — Section 323, 324, 380, 443, 453

Citation : (1981) 52 CLT 393

Hon'ble Judges : R.N. Misra, C.J

Bench : Single Bench

Advocate : G. Bohidar and S.K. Mund, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, C.J.—The Petitioners, 2 in number, were charged for offences under Sections 457, 380 and 323, Indian Penal Code. A common charge has been framed against all of them to the following effect:

First - That you, on or about 15-4-1973 (for 1974) at Hadmanda, committed lurking house trespass by night by entering in to the house belonging to the informant and used as a human dwelling after sunset and before sunrise in order to commit theft and thereby committed an offence punishable u/s 457 of the Indian Penal Code and within my cognizance.

Secondly - That you Bimbadhar Jena and Gangadhar Jena, on or about the same time and place, voluntarily caused hurt to Bhagaban Jena and thereby committed an offence punishable u/s 323 of the Indian Penal Code and within by cognizance.

Thirdly - That you, Gadadhar Jena, on or about the same time and place voluntarily caused hurt to Kartik Pani, Bhanu Jena and Dibakar Giri by means of a knife which is an instrument for stabbing and thereby committed an offence punishable u/s 324 of the Indian Penal Code and within my cognizance.

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2. The trial Court convicted all the three accused persons for all the 3 offences and sentenced each of them to R.I. for six months and to pay a fine of Rs. 100/- with a default sentence of 15 days each u/s 457, Indian Penal Code and to pay a fine of Rs. 100/-, in default, simple imprisonment for 20 days u/s 323, Indian Penal Code. No separate sentence was imposed u/s 380, Indian Penal Code.

3. The learned Sessions Judge on appeal came to hold that the offences under Sections 323 and 380, Indian Penal Code had not been established. He accordingly set aside the conviction under those counts and sustained the conviction u/s 457, Indian Penal Code. The sentence of six months R.I. for each of the Petitioners under that section was sustained, but the imposition of fine was set aside.

4. This revision directed against the appellate decision calls in question the propriety of there conviction u/s 457 Indian Penal Code when the conviction on the other two count has been set aside.

5. Section 457 of the Indian Penal Code provides:

Whoever commits lurking house trespass by night or house-breaking by night, in order to the committing of any offence punishable with imprisonment shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and, if the offence intended to be committed is theft the term of the imprisonment may be extended to fourteen years.

"Lurking house trespass" has been defined in Section 443 of the Code to mean

Whoever commits house trespass having taken precautions to conceal such house trespass from such person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house trespass.

Whoever commits lurking house trespass after sunset and before sunrise is said to commit lurking house trespass by night as indicated in Section 443, Indian Penal Code. In order that the act may come within the ambit of Section 457, Indian Penal Code, it is necessary that the lurking house trespass should have been committed with a view to commit an offence punishable with imprisonment. The charge in the instant case was that the lurking house trespass was with the intention of committing theft. There was a charge for theft which has failed. Therefore, even if trespass had been committed, the conviction u/s 457, Indian Penal Code cannot be sustained.

6. The next question for consideration is-Can the Petitioners be convicted for some other offence?

Admittedly, lurking house trespass is a serious offence. There are several other provisions where lurking house trespass is made punishable. Section 453, Indian

Penal Code, provides:

Whoever commits lurking house trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

There could be some scope for contention that even if the offence u/s 457, Indian Penal Code was not accepted to have been proved, the matter could be covered by Section 457, Indian Penal Code. The evidence relating to house trespass is somewhat weak. The prosecution witnesses have spoken about their seeing the Petitioners running. Their case is that the Petitioners were chased from behind and ultimately caught red-handed. The chasing as also the act of catching were all outside the house. There is no clear evidence as to whether the accused person were really found inside the premises. In the circumstances, in my opinion it would not be appropriate to hold the Petitioners guilty for any other offence of trespass.

7. The revision application is accordingly accepted and the conviction of the Petitioners u/s 457, Indian Penal Code as also the sentence imposed therefore are set aside. The bail bonds be cancelled.