
(2016) 01 OHC CK 0043
In the Orissa High Court
Case No : CRLA No. 432 of 2014

Ghasi	Vs	APPELLANT
State of Orissa		RESPONDENT

Date of Decision : 29-01-2016

Acts Referred:

Arms Act, 1959 — Section 25, Section 25(1-A), Section 27, Section 27(1), Section 5, Section 7
Penal Code, 1860 (IPC) — Section 121, Section 121-A, Section 124-A, Section 307
Unlawful Activities (Prevention) Act, 1967 — Section 20

Citation : (2016) 01 OHC CK 0043

Hon'ble Judges : Raghubir Dash, J.

Bench : Single Bench

Advocate : Prasanta Kumar Jena and D.P. Mohapatra, for the Appellant; J.P. Patra, Additional Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Raghubir Dash, J.—1. Being aggrieved by the judgment dated 9.6.2014 and subsequent order of sentence dated 10.6.2014 passed by the learned Additional Sessions Judge, Koraput in Criminal Trial No. 05 of 2013, the Appellant has preferred this appeal. Learned court below has convicted and sentenced the Appellant as follows:-

Conviction under

Sentences

Section 17(1) of Criminal Law (Amendment) Act, 1908

:

Imprisonment for six months with fine of Rs. 5,000/-, in default, R.I. for one month.

Section 27 of Arms Act, 1959

:

Imprisonment for 5 years with fine of Rs. 10,000/-, in default, R.I. for 1 year.

Section 20 of Unlawful Activities (Prevention) Act, 1967

:

Imprisonment for 10 years with fine of Rs. 20,000/-, in default, R.I. for 2 years.

2. According to the prosecution, on 4.4.2011 the Inspector-in-Charge of Semiliguda P.S. got information that one Ghasi @ Khatru @ Chadha Bhusan, a Senior armed Cadre Maoist of Srikakulam-Koraput Joint Division of CPI Maoist Group, who was also wanted in Semiliguda P.S. Case No. 76 of 2016, was expected to move towards Village-Dudhari from the side of Village-Upper Kanti in the evening hours of the very same day. Accordingly, the police officer entered the fact in Station Diary of the P.S. and proceeded towards Village-Pendajam which is located in between Villages Upper Kanti and Dudhari being accompanied by police personnel attached to the police station. Having reached at a particular spot in between Upper Kanti and Dudhari all the police personnel kept themselves concealed by the side of the road awaiting for the arrival of said Ghasi. At about 7.30 P.M. a commander jeep was seen coming from Upper Kanti side. It was detained. When the vehicle was being searched a person, sitting next to the driver in the front seat, attempted to escape by jumping from the vehicle. He also attempted to open fire at the police personnel. While he was taking out his gun from under his waste the police personnel could over-power him and recovered the gun from his possession. Thereafter, Inspector-in-Charge of the Police Station, who is the informant in this case, took personal search of the suspected person observing all formalities. Besides the gun loaded with ammunitions, one pouch containing 12 ammunitions, tied around the waist of the person, was also recovered. One cotton carry-bag was recovered wherein several papers were kept. On verification, it was found that most of the papers contained Maoist literature written in both Telgu and Odia languages. On interrogation, the suspect disclosed his name as Ghasi @ Khatru @ Chenda Bhusan with his address and admitted that he belongs to armed cadre of Srikakulam-Koraput Joint Division of CPI (Maoist) Organization. He failed to produce any license for the arms and ammunitions he was possessed of. Drawing plain paper F.I.R. at the spot, the informant seized the materials which were recovered from the possession of the suspect and arrested him. The suspect is the Appellant-Accused. Thereafter, the Accused along with the seized articles was brought to the police station where the case was registered. On the request of the informant the D.S.P., Sunabeda took up investigation of this case.

3. In course of investigation, the I.O., besides taking different steps, moved the Collector-cum-District Magistrate, Koraput as well as State Government for sanction to prosecute the accused under Sections 25/27 of Arms Act, Sections 121/121-A/124-A of I.P.C. and Section 20 of Unlawful Activities (Prevention) Act, 1967. After receipt of sanction order from the District Magistrate for prosecution

under the Arms Act, the I.O. submitted charge-sheet on 1.10.2011. Thereafter, he received sanction order from the Government of Orissa for prosecution under Section 20 of the Unlawful Activities (Prevention) Act and submitted supplementary charge-sheet on 8.1.2012. Thereafter, another sanction order from the Government of Orissa was received for launching prosecution under Section 121/121-A/124-A of I.P.C. against the accused. On 21.10.2011 the case was committed to the Court of Sessions. Upon commitment, learned Sessions Judge transferred the case to the Ad hoc Additional Sessions Judge for trial. On 19.1.2012 charges were framed under Sections 121/121-A/124-A/307 of I.P.C., Section 17 of Criminal Law (Amendment) Act, Section 25(1-A) and 27 of the Arms Act, and Section 20 of the Unlawful Activities (Prevention) Act.

4. The defence plea is one of denial as well as false prosecution.

5. All total 15 witnesses were examined at the trial. P.Ws. 3, 4, 5, 6, 7, 8, 11, 12 and 13 are the raiding party members. Out of them, P.W. 14 is the Inspector-in-Charge of the Police Station, who is also the informant. P.Ws. 1 and 2 are two formal witnesses to the re-seizure of all the seized articles subsequent to handing over investigation to the D.S.P. P.W. 9 was an occupant of the vehicle which was intercepted by the raiding party. P.W. 10 is the driver of the said vehicle. P.W. 15 is the D.S.P. who investigated into the case.

Defence declined to adduce any evidence.

6. Learned court below, having dealt with the evidences adduced by the prosecution, has disbelieved the plea of recovery of any fire arm from the Appellant's possession but accepted the plea of recovery of ammunitions as well as the papers containing Maoist literature from his possession. It is also held that the prosecution failed to prove the commission of offences punishable under Section 121/121-A/124-A/307 of I.P.C. and Section 25(1-A) of Arms Act and acquitted the Appellant of all those charges.

7. Impugned judgment has been challenged on several grounds. It is contended that learned trial court without proper application of judicial mind to the facts and law involved in the case recorded the order of conviction, that the order of conviction under Section 27 of Arms Act is totally on the basis of unfounded presumption, that the conviction under Section 20 of the Unlawful Activities (Prevention) Act is totally based on surmises and conjectures, that conviction under the Criminal Law (Amendment) Act is also unfounded inasmuch as mere membership of a banned organization, even if the Appellant is presumed to be a member of such an organization, cannot incriminate him unless he is shown to have resorted to acts of violence or insisting people to imminent violence. It is further contended that conviction under Section 27 of the Arms Act in the absence of ballistic examination of the arms or ammunitions by an expert is unsustainable. Further contention is that absence of obtaining permission of the State Government before taking cognizance of the offence under Section 20 of the Unlawful Activities (Prevention) Act vitiates the trial. It is also contended that

the prosecution totally failed to establish the Appellant's connection with any banned organization and that the various papers allegedly recovered from the possession of the Appellant do, in fact, contain Maoist literature and that those articles were recovered from the exclusive possession of the Appellant.

8. As usual, learned counsel for the State argues in support of the findings recorded by the court below. It is not pointed out by the learned counsel for the State that the State has preferred any appeal against the acquittal of the Appellant under Sections 25(1-A) of Arms Act and Sections 121/121-A/124-A and Section 307 of I.P.C.

9. Not a single witness examined in this case has turned hostile. Both official and non-official witnesses have supported the prosecution case. They have stated about the manner in which the vehicle in which the suspected person was moving was detained, how the suspect attempted to escape but was over-powered by the raiding party members and so many materials including one fire arm and some ammunitions were recovered. Though the witnesses have been cross-examined by the defence nothing substantial could be elicited to discard the testimony of any of them. In this background let it be examined as to whether the prosecution has been able to bring home those charges under which the Appellant has been convicted.

Section 27 of the Arms Act prescribes punishment for using arms or ammunitions in contravention of Section 5 or Section 7 of the Arms Act. In the charge framed against the Appellant it is stated that the Appellant used "gun and ammunition in contravention of Section 5 of the Arms Act". Learned court below has disbelieved the prosecution case to the extent that M.O.I., one pistol with holster, was seized from Appellant's possession. It is held that recovery and seizure of fire arm from the Appellant's possession could not be established. However, on the basis of recovery of 22 number of bullets learned trial court convicted the Appellant under Section 27 of the Arms Act. Admittedly, the ammunitions were not put to ballistic test and there was no expert opinion as to whether the bullets so recovered are coming within the definition of the word "ammunition" as defined under the Arms Act. Learned court below relied on the judgment of the Hon'ble Apex Court in Harnek Singh Vs. State of Punjab, reported in , 1999 CrL. L.J. 452 to support his stance that one can be held liable under Arms Acts even in the absence of examination of Arms and ammunitions by any expert. Defence relied on another decision of Hon'ble Apex Court in Surrender Vs. State of Haryana, reported in 1994(II) CRIMES 953 where it is held that a cartridge can be ammunition for any fire arm if it is live and for that reason it is incumbent on the prosecution to prove that the cartridges recovered from the accused are alive. This judgment was not followed on the ground that the judgment in Harnek Singh's case (supra) is later in point of time. In Harnek Singh's case (supra) one pistol with 25 live cartridges were seized with 10 loaded in the pistol. Two police officers deposed to the effect that the pistol was in working order. There was no cross-examination of those two witnesses regarding working condition of the

pistol. Therefore, the Hon"ble Apex Court, observing that the police officers were competent enough to depose about the condition of the weapon with further observation that the pistol was loaded with cartridges, held that there was reasonable certainty that the pistol was in working condition and the conviction of the appellant therein for possessing the fire-arm without a permit or licence was held to be justified. In the case at hand, there is no such evidence. Therefore, simply on the ground that Harnek Singh's case (supra) being later in point of time is binding and ballistic examination (to establish that the cartridges were live ones) is not necessary, is not the correct way of appreciating the evidence on record. In the facts and circumstances of the case, in the case in hand expert opinion as to whether cartridges were live or not is considered to be essential. Be that as it may, mere possession of the bullets is not punishable under Section 27(1) of the Arms Act, unless there is evidence that the Appellant had the bullets in his possession for sale, transfer, conversion, repair, test or proof or that he had used the same in any manner. In the case at hand, there is no allegation to that effect. Therefore, prosecution has failed to establish commission of an offence punishable under Section 27(1) of the Arms Act.

10. Merely on the recovery of some papers said to be containing Maoist literature, learned court below has presumed that the Appellant is a member of CPI (Maoist) Organization and, observing that CPI (Maoist) has been declared as a Terrorist Organization, found the Appellant guilty of the offence punishable under Section 20 of the Unlawful Activities (Prevention) Act as well as Section 17 of the Criminal Law (Amendment) Act, 1908.

Learned counsel for the Appellant argues that the presumption of the learned court below basing on the recovery of some papers containing Maoist literature is not supported by legal evidence. Further submission is that even if such a presumption is found to have got any basis, it is well settled that mere membership of a banned organization cannot incriminate a person unless he is proved to have resorted to acts of violence or has incited people to imminent violence or the person does any act intended to create disorder or disturbance to public peace. In this regard, he has relies on the judgments of the Hon"ble Apex Court in Sri Indra Das v. State of Assam, reported in , (2011) 48 OCR (SC) 799 and , (2011) 3 SCC 377: Arup Bhuyan v. State of Assam wherein it is held that mere membership of a banned/terrorist organization will not make a person criminal unless he resorts or incites people to violence. Also in the case at hand, there is no evidence showing the Appellant's involvement in any terrorist activities. There is no evidence that he has ever resorted to violence or incited people to get involved in violence. Therefore, the order of conviction under Section 20 of the Unlawful Activities (Prevention) Act as well as Section 17(1) of the Criminal Law (Amendment) Act, merely on the ground that he is a member of a banned organization, is not sustainable. The learned court below has made no discussion on such requirement of the law. It has not recorded any finding that as a member of any unlawful Association the Appellant had taken part in meetings of such Association or contributed or received or solicited any

contribution for the purpose of such Association or in any way assisted the operations of any such Association which would make him punishable under Section 17(1) of the Indian Criminal Law Amendment Act, 1908.

11. Learned counsel for the State argues that since the appellant was found moving with C.Ds., pamphlets, sheets of letter pad and a book containing Maoist literature, along with arms and ammunitions, it is to be presumed that he was assisting the operations of Maoist Organization in the district of Koraput. Learned counsel for the Appellant, however, submits that there is neither any legal evidence showing recovery of any materials containing Maoist literature nor is there any reliable evidence establishing the recovery from the exclusive and conscious possession of the Appellant. The argument advanced by the learned counsel for the Appellant appears to be quite forceful. It is pointed out by the learned counsel for the Appellant as to how the learned court below in the impugned judgment has referred to some of the papers allegedly recovered from the possession of the Appellant written in Telugu but there is, admittedly, absence of transcription of the contents of those papers into Oriya language and there is also no expression in the impugned judgment that the learned Additional Sessions Judge delivering the judgment himself was able to read Telugu.

12. It is true that learned court below has placed reliance on the contents of certain documents marked as M.Os. II, V, VI, XIV, XVIII, XXIII, XXVI, XXX AND XXXII. Out of these M.Os., M.O. II is a diary. It is not clear as to whether its contents are in Oriya or in Telugu language. M.O.VI consists of two C.Ds. Rest of the M.Os. are documents in Telugu language. Learned trial court has reflected the contents of these documents in the judgment itself and come to a conclusion that the M.Os. reveal disruptive activities of Maoist cadre, that the appellant is a leader of the Maoist organization and that the organization which is banned by the Government of India, has imparted instructions to extend the activities of the organization by motivating the poor Adivasis.

13. Learned counsel for the Appellant is correct in making submission that the learned court below could not have referred to the contents of the documents which were not duly proved and therefore, was never marked as exhibits. The articles allegedly seized from the possession of the Appellant have been marked as M.Os. without objection. Such marking may give rise to a presumption that the M.Os. were seized at the time of the raid. But the contents of the documents which could not be exhibited by the prosecution cannot be used as evidence. Apart from that the learned trial court has not clarified it in the judgment itself that he knows reading Telugu and therefore, he could come to know what are the contents of the M.Os. such as M.Os. V, XIV, XVIII, XXIII, XXVI, XXX and XXXII which are all in Telugu language.

14. The other part of the argument is that the prosecution evidence on the recovery of the articles from the exclusive and conscious possession of the Appellant is unsatisfactory. P.W. 3 has stated that when the accused was trying to run away, the Police personnel chased and caught him. He has further stated that

a bag was recovered from the Jeep in which some papers in Telugu language were found. There is evidence on record that besides the appellant there were two other persons as occupants of the Jeep. One of them is the driver (P.W. 10) and the other (P.W. 9) is said to be the Helper. Mere recovery of the bag from the Jeep by which the appellant was travelling is not sufficient for a presumption that the Appellant was in possession of the bag. Many other P.Ws. such as P.Ws. 4, 5 and 8 do not say as to wherefrom the bag was recovered. Some other P.Ws. such as P.Ws. 6, 7 and 9 have simply stated that the bag was recovered from the Appellant's possession. Neither the driver nor the Helper of the Jeep has stated that the Appellant boarded the Jeep with the bag in question. The informant also does not specify either in the F.I.R. or in his deposition as to under what circumstances the bag was recovered. P.Ws. 11, 12 and 13 say that the Appellant while attempting to run away was holding the bag. Thus, there is inconsistent evidence on the circumstances under which the bag was recovered. Therefore, from the mere recovery of some papers allegedly containing Maoist literature, the Appellant cannot be presumed to be a member of Maoist organization or being a member of CPI (M) organization was assisting the operations of that organization, more so when the evidence on the recovery from the Appellant's possession appears to be quite unsatisfactory.

15. In addition to all these, the learned Trial Court has not clarified as to what is the basis of his finding that CPI (M) has been declared by the Central Government as a banned organization (page-20) or a terrorist organization (page-21) or an unlawful Association (page-23) and that the Appellant is a member of such Organization/Association.

16. Thus, it is found that gravamen of the offences of which the Appellant has been convicted could not be proved by the prosecution. As a result, the order of conviction as well as sentence is liable to be set aside.

17. The Appeal is allowed. Impugned judgment convicting the Appellant and sentencing him under different counts is set aside. Appellant-Accused is found not guilty of the offences punishable under Section 17(1) of Criminal Law (Amendment) Act, 1908, Section 27 of Arms Act, 1959 and Section 20 of Unlawful Activities (Prevention) Act, 1967 and, therefore, acquitted of the charges. He be set at liberty at once, if not required to be detained in any other case. As regards the order on disposal of the seized properties, it is directed that cash of Rs. 9,540/- seized from the possession of the Appellant be returned to him. Rest part of the order on the disposal of the properties passed by the learned court below stands confirmed.