

(2000) 12 OHC CK 0016
In the Orissa High Court
Case No : Criminal Revision No. 474 of 1998

Giria ' Giridhari Parida and others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 11-12-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 306, 306(4), 307, 307(2)
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2001) 91 CLT 639 : (2001) 20 OCR 384 : (2001) 1 OLR 254

Hon'ble Judges : B.P. Das, J

Bench : Single Bench

Advocate : M/s D.P. Dhal, D.K. Das and D. Patnaik, for the Appellant; Mr. S.K. Sahoo, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Das, J.—This revision application is directed against the order dated 23-10-1993 passed by the learned Addl. Sessions Judge, Nayagarh in S. T. Case No. 96/23/150 of 1997-96 whereby accused Niranjana Mohapatra has been considered as an accomplice for commission of the offences punishable under sections 376(2)(g), 302/201 read with section 34, I. P. C. .

2, The accused Niranjana Mohapatra, was the brother of the deceased Namita, and was made an accomplice in the aforesaid case. His statement was also recorded u/s 164, Cr. P. C.. According to learned Addl. Sessions Judge, said statement of Niranjana Mohapatra was ex-culpatory and on scrutinising the evidence on record, learned Addl. Sessions Judge found that the said Niranjana Mohapatra had no involvement in the alleged crime, but only took part in cremating the deadbody of Namita, who was no other than his sister. For this, he was charge-sheeted under sections 201/34, I.P.C.. Neither the investigating agency made any effort to make the accused Niranjana an approver or tendering pardon u/s 306, Cr.P.C. nor has he been examined in the court during the trial of the case. The learned trial court on evaluating the evidence on record which is

primarily circumstantial in nature found that the accused Ashok Mallik and Giridhari Parida have been implicated to be the perpetrators of the alleged crime of rape and murder of the deceased Namita. At the same time that to when direct evidence is available in the case on the statement of the accomplice, the prosecution ought to have utilised the same in establishing the charge against the accused persons by making Niranjana an approver or tendering him pardon. The statement so recorded u/s 164, Cr. P. C., could not have been utilised nor could be utilised in order to establish the charge against the co-accused persons. Taking the above facts into account, the trial court thought it proper before pronouncing the judgment to take resort to section 307, Cr. P. C. and accordingly tendered pardon to the accomplice Niranjana Mohapatra thereafter proceeded to examine him as a court witness u/s 311, Cr.P.C. The approver also accepted the pardon and expressed his willingness to give full disclosure of the incident which had taken place on the fateful night, and also allowed the defence to cross-examine him (approver) after his examination-in-chief. On the request of the defence counsel, the learned Addl. Sessions Judge, granted time till 27-10-1998 for cross-examination of the approver. Against the aforesaid order of learned Addl. Sessions Judge, the other accused persons filed this revision, inter alia, on the grounds stated below :

(i) The learned Addl. Sessions Judge has acted illegally in holding that he has jurisdiction to grant pardon to Niranjana Mohapatra though there is no prayer of Niranjana Mohapatra much less the Public Prosecutor in that regard.

(ii) The learned Addl. Sessions Judge has not considered the fact that Niranjana Mohapatra on the basis of the materials on record, cannot be considered as an accomplice so that sub-section (2) of section 307, Cr. P. C. would be pressed into service.

pardon to Niranjana Mohapatra to be examined as a court witness on the date to which the Case was posted for hearing.

(iv) The plea of the accused No. 2 that he had been seriously prejudiced as the learned defence counsel had not given adequate opportunity to get prepared to defend the case.

3. The case of the prosecution, in short, is that, the deceased Namita Mohapatra was residing in her house with her brother, that is the co-accused - Niranjana Mohapatra, and her mother, Promodini Mohapatra. One of their rooms was given on rent to p. w. 2, Dilip Kumar Pani. A feast was arranged in the house of the deceased Namita, and p. w. 2 was invited to that feast. The petitioners and the co-accused Niranjana were also present in that feast. The present petitioner took liquor and at their instance co-accused Niranjana also took liquor. The mother of the deceased was not present at the time of occurrence. P. w. 2 took a little quantity of liquor but the accused-petitioners drunk heavily. When the accused persons were going to take their food, the present petitioners viz. Ashok alias Babuli Mallik and Giridhari Parida assaulted Dilip Kumar Pani (p. w. 2) for which

he escaped from the spot and thereafter the other accused persons compelled Niranjana to take more liquor and later on petitioners, Ashok Mallik and Giridhari Parida committed rape on the deceased. The co-accused Niranjana could not do anything to protect her sister, because the accused Ashok and Giridhari threatened to kill him. Out of shame, the deceased committed suicide by hanging. Both the accused persons Ashok and Giridhari persuaded Niranjana to cremate the deadbody. In spite of protest from the uncle of co-accused Niranjana, accused Giridhari and Ashok forcibly cremated the deadbody with firewood, kerosene and old cycle tyres.

4. In course of the investigation of the case, the statement u/s 164, Cr. P. C. of the co-accused Niranjana Mohapatra was recorded. On perusal of the same, it transpired that the entire occurrence described vividly is nothing but a gruesome act of rape and murder,

5. In course of trial 13 witnesses were examined on behalf of the prosecution and the case was posted for judgment to 23-10-93 after conclusion of the argument from both the sides. After perusing the evidence on record, the court below thought it proper to tender pardon to co-accused Niranjana and made him an approver so that the direct evidence regarding the rape and murder can be available if the said Niranjana will be examined as a court witness. Hence, the power u/s 307, Cr. P. C. was invoked and the impugned order was passed.

6. Learned counsel for the petitioners states that when no application was filed by the accused Niranjana Mohapatra, the court below should not have invoked the jurisdiction u/s 307, Cr. P.C. and granted pardon to the said accused on the day the judgment was to be pronounced.

7. Before going through the evidence, let me examine first whether there is any irregularity in the order passed by the learned Addl. Sessions Judge while granting pardon to accused Niranjana.

At this stage it is profitable to quote section 307, Cr.P.C.,

"307. Power to direct tender of pardon- At any time after commitment of a case but before judgment is passed, the court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person." Section 308, Cr. P. C. speaks as follows :

"303. Trial of person not complying with conditions of pardon-

(1) Where, in regard to a person who has accepted tender of pardon made u/s 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was tendered for any other offence of which he appears to have been guilty in connection with the

same matter, and also for the offence of giving false evidence. Provided that such person shall not be tried jointly with any of the other accused ;

Provided further that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court and nothing contained in section 195 or section 340 shall apply to that offence.

(2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate u/s 164 or by a Court under sub-section (4) of section 306 may be given in evidence against him at such trial.

(3) At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made; in which case it shall be for the prosecution to prove that the condition has not been complied with.

(4) At such trial, the court shall-

(a) If it is a Court of Session, before the charge is lead out and explained to the accused ;

(b) If it is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken; ask the accused whether he pleads that he has complied with the conditions, on which the tender of the pardon was made,

(5) If the accused does so, plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in this Code, pass judgment of acquittal."

8. A conjoint reading of section 307 and section 308, Cr. P. C., makes it clear that an application by a person asking for pardon is not necessary because it is the court acting any time before the judgment is passed to take recourse to section 307, Cr. P. C. if the circumstance so demands. Section 308, Cr. P. C. relates to the subsequent course of action which casts a duty on the public prosecutor, if in his opinion the person, who has accepted the tender of pardon made under sections 306 and 307, Cr. P. C. has either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which pardon was so tendered.

9. So the argument of the learned counsel for the petitioners that an application is necessary for the purpose of tendering pardon does not hold good. That part, the order-sheet of the Sessions Court at SI. 44 dated 27-10-1998 indicates that the approver has been cross-examined by the State defence counsel and an application was filed to recall the Investigating Officer. In the meantime this revision was filed and the order of stay was granted on 3-13-98. From the impugned order dated 23-10-98, it transpires that the accused persons were given an opportunity to cross-examine the co-accused Niranjana. The defence has

participated in the proceeding and no objection was raised in this regard, by the defence in the trial court. The very object of the provision is to allow pardon to be tendered in cases where a grave offence is alleged to have been committed by several persons so that with the aid of evidence of the person so pardoned the offence could be brought home to the rest. (See State of Andhra Pradesh Vs. Cheemalapati Ganeswara Rao and Another,

10. In the present case no objection from the side of the Public Prosecutor was raised that the person who accepted the pardon has concealed anything essential and has given false evidence. The further argument of the learned counsel for the petitioners is that the learned Addl, Sessions Judge is at fault by not considering the fact that Niranjana Mohapatra, on the basis of the material on record, cannot be considered as an accomplice so that the provisions of law relating to grant of pardon will be applicable to him. In my view, all that the relevant provisions require is that a person should be supposed to have been directly or indirectly concerned with the offence with which another is charged, it is not necessary that the person pardoned should be an accused in the case. The argument of the learned counsel for the petitioners is that when exculpatory statement of Niranjana has been recorded u/s 164, Cr. P.C., he cannot be pardoned. The provisions of section 307, Cr. P. C. indicates the xx xx xx xx xx xx any person supposed to have been directly or indirectly concerned in, or privy to, any such offence. So in my opinion, the trial court has not done any irregularity by tendering pardon to accused Niranjana Mohapatra.

11. In this regard, I may refer to a decision of the Apex Court reported in 1998 14 OCR 53, (A. Devendran through Supreme Court Legal Services Committee etc. v. State of Tamil Nadu through the Secretary, Department of Home, Fort St. George, Madras), wherein it is held that the prominent object of sections 306 and 307, Cr. P. C. is that the offenders of the heinous and grave offences do not go unpunished. There can be no objection against tender of pardon to an accomplice simply because in his confession he does not implicate himself to the same extent as the other accused persons.

12. From the statement u/s 164, Cr. P. C., it is crystal clear that the said Niranjana was present in the spot at the time of occurrence and witnessed the rape on his sister. He could not protest on being threatened by the accused persons. He was forced to dispose of the dead body of his sister. From this a safe conclusion can be drawn that the said Niranjana is concerned, directly and privy to such an occurrence. The allegation of the petitioners that the State defence counsel has not properly cross-examined the approver is not correct.

13. On perusal of the records of the trial court, I find that there is no substance in such an allegation. Accordingly, the Criminal Revision fails and the same is dismissed. The order of the learned Addl. Sessions Judge passed on 23-10-98 is confirmed and at the same time I direct to complete the trial within six weeks from the date of receipt of this order. The order be communicated by the registry forthwith.

14. Crl. revision dismissed.