
(2003) 01 OHC CK 0047

In the Orissa High Court

Case No : Jail Criminal Appeal No. 173 of 1999

Nimai Bhandari @ Barik and Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 10-01-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 395

Citation : (2003) 95 CLT 208

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : U.K. Lenka, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

L. Mohapatra, J.—The appellants are the two accused persons out of five who have been convicted for commission of offence u/s 395 , of the Indian Penal Code and sentenced to imprisonment for 10 years.

2. The case of the prosecution is that on 18.4.97 at about 9.30 P.M. while P.Ws. 1 and 2 and some other passengers were travelling in the Link Express, in between Muniguda and Therubali Railway Stations, 8 of the co-passengers started looting their fellow passengers in the compartment under threat of their lives at the point of knives. The culprits looted P.W. 1 and his wife P.W. 2 who belong to Andhra Pradesh and were travelling from Bilashpur to Bobbili. So far as these two witnesses are concerned, it is alleged that the culprits took away cash and gold ornaments from them. It is also alleged by the prosecution that other fellow passengers who were in the compartment were looted of their cash and cloths. In course of commission of offence one of the culprits namely Raju Pattnaik fell down on from the running train along with the loot and sustained injuries. The remaining culprits stopped the train at a short distance before Therubali Railway Station by pulling chain and decamped with the looted properties. After Therubali Railway Station, when the train arrived at Rayagada Railway Station, P.W. 1

lodged a written report before the Officer-in-charge of Government Railway Police Station at about 11.30 P.M. and basing on the said report the case was registered and investigation was started. In course of investigation the accused Raju Pattnaik was detected lying in an injured condition on the side of the railway track in between the level crossing known as Bissam-cuttack Level Crossing and Therubali Railway Station in the morning of 19.4.1997. Some of the looted properties were also recovered from his possession which were lying near him and then he was put in the Government Hospital, Rayagada where he was treated as an indoor patient for nearly two months. In course of his treatment in the Hospital relying on his statement recorded on 25.4.97 and on basis of other informations collected the rest of the accused persons were arrested and put to trial. The learned Asst. Sessions Judge, Rayagada on consideration of the evidence of P.Ws. 1, 2 and 14 convicted the present appellants for commission of offence u/s 395 of the Penal Code and acquitted the other 3 accused persons.

3. The learned counsel appearing for the appellants submitted that so far as the appellant No. 1 Nimai Bhandari @ Barik is concerned, there is no evidence of identification which can be legally accepted and there was also no recovery from his person of any stolen article. The only evidence against him is statement leading to discovery of one gold ear flower which was later identified in the T.I. Parade of articles by P.W. 2. According to the learned counsel, the appellant No. 1 could not have been convicted u/s 395 of the Penal Code on the basis of such evidence only by taking recourse to Section 114 of the Evidence Act. So far as appellant No. 2 is concerned, the learned counsel submitted that T.I. Parade having been conducted after considerable delay, the same should not have been accepted by the Trial Court and the alleged identification by the P.W. 1, so far as this appellant is concerned is not worthy of credence.

4. The learned Additional Government Advocate appearing on behalf of the State submitted that so far as the appellant No. 2 is concerned, he has been identified in the T.I, parade as well as in Court and there has also been recovery of some stolen articles and therefore, the learned Asst. Sessions Judge was justified in convicting him u/s 395 of the Penal Code. So far as the appellant No. 2 is concerned referring to the discussions made by the learned Asst. Sessions Judge, it is submitted by the learned Addl. Government Advocate that he having been identified in Court, this evidence coupled with the fact of leading to discovery of stolen articles, are enough to convict him u/s 395, IPC.

5. From the record it appears that out of 15 witnesses examined on behalf of the prosecution evidence of P.Ws. 1, 2 and 14 are relevant for the purpose of deciding the case. P.W. 1 in his evidence has categorically stated that in the T.I. parade before the Magistrate, he could identify Tiki Behera (Appellant No. 2), Raju Pattnaik (acquitted) and Debraj Agrawal (acquitted) as the culprits who participated in looting him and his wife properties as well as the properties of co-passengers in the Train. He has also specifically admitted that he could not identify the remaining accused persons in that T.I. parade. From the evidence of

P.W. 14, it appears the T.I. parade in respect of the suspected persons had been conducted on 11.9.97 i.e., around 4 and half months after the date of occurrence. This witness P.W. 1 was examined on 29.6.98 in Court and even though he had not been able to identify the appellant No. 1 in the T.I. parade which was conducted near about 4 and half months after the occurrence he identified the appellant No. 1 in Court after about more than a year from the date of occurrence. I am unable to accept the evidence of P.W. 1 so far as his evidence regarding identification of appellant No. 1 in Court is concerned. So far as appellant No. 2 is concerned, from the evidence of P.W. 1 it appears that he was not only identified in the T.I. parade before the Magistrate but also in the Court and it has been specifically stated by P.W. 1 that the appellant No. 2 looted the gold Mangal Sutra and gold beaded necklace evidence has also not only identified the appellant No. 2 but also stated that he was the person who looted her gold ornaments in the Train. However, this witness has not identified any other accused in the Court. On analysis of such evidence it is clear that the appellant No. 2 - Tiki Behera has been identified in T.I. parade as well as in the Court and evidence of P.Ws. 1 and 2 clearly prove the same. So far as recovery of gold ornaments are concerned from the evidence on record it also appears that Mangal Sutra in a melted form has been recovered from the appellant No. 2. I am therefore, of the view that the reasons assigned by the learned Asst. Sessions Judge, Rayagada while convicting the appellant No. 2 need not be interfered with. So far as the appellant No. 1 is concerned, I have already held that he had not been identified in the T.I. parade conducted four and half months after the occurrence but the same witness could identify him after more than one year in the Court and therefore, I am unable to accept such evidence with regard to identification. The only other evidence available against the appellant No. 1 is the statement leading to discovery of a gold ear flower. Even if, this evidence is accepted to be correct the appellant No. 1 cannot be convicted u/s 395 of the Penal code in absence of any other material to show that he was one of those accused persons who participated in the commission of offence. The evidence with regard to recovery of the gold ear flower which has been identified by P.W. 2 in the T.I. parade is also not free from doubt. The seizure witnesses have turned hostile and the person from whom the said ornament was seized stated that she had not purchased from the appellant No. 1. In view of such evidence, I am also not in a position to accept the evidence with regard to the statement made by the appellant No. 1 leading to discovery of the said gold ornament.

6. In view of the reasons stated above, the appeal is partly allowed. The appellant No. 1 - Nimai Bhandari @ Barik is acquitted of the charge u/s 395 of the Penal Code and his conviction under the said provision by the learned Asst. Sessions Judge is set aside. So far as the appellant No. 2 - Tiki Behera @ T. K. Behera @ Raju is concerned, the appeal stands dismissed. The judgment and order of conviction passed by the learned Asst. Sessions Judge convicting him u/s 395 of the Penal Code stands confirmed. The learned counsel for the appellant prayed for reducing sentence of imprisonment imposed on the appellant No. 2 on

the ground that he has already remained in custody for about six years. Since the incident relates to a dacoity in a train which has become a usual feature. I am of the view that the sentence imposed by the learned Asst. Sessions Judge need not be reduced. Accordingly, the sentence imposed by the learned Asst. Sessions Judge also stands confirmed.