

(2011) 01 GAU CK 0053

In the Gauhati High Court

Case No : Criminal Revision Petition No. 6 of 2003

Prabhat Marak and Another

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 31-01-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 342
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 7
Penal Code, 1860 (IPC) — Section 148, 149, 392, 447, 448

Citation : (2011) CriLJ 1844 : (2011) 4 GLR 247

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Advocate : P. Dutta, for the Appellant; D. Sarkar, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

U.B. Saha, J.—In this criminal revision petition, the accused Petitioners, namely, Prabhat Marak and Kishore Marak, have challenged the judgment dated 14-11-2002, passed by the learned Additional Sessions Judge, West Tripura, Khowai in CrL. A. No. 19(3)/2003 whereby and whereunder the judgment dated 2-8-2002 in G. R. Case No. 183 of 2000 passed by the learned SDJM, Khowai, convicting them u/s 448 IPC and sentencing to suffer S.I. for three months and to pay a fine of Rs. 1000/- each. i.d. to suffer S.I. for fifteen days and also convicting them u/s 392, IPC and sentencing to suffer S.I. for three years and to pay a fine of Rs. 3000/- each i.d. to suffer S.I. for 45 days was upheld. The fine money in total Rs. 8,000/-, if realized, was directed to be paid to the complainant.

2. Heard Mr. P. Dutta, learned Counsel for the Petitioners as well as Mr. D. Sarkar, learned Public Prosecutor appearing for the Respondent-State.

3. The prosecution case as revealed from the Ejahar i.e. the First Information Report (FIR), is that, on 1-7-2000 at about.18.00 hours, one Mani Lal Debnath

(P.W. 1) lodged an FIR to the Officer-in-charge, Kalyanpur P. S. alleging that on 30-6-2000 at about 2.30 p.m., the accused persons along with their associates, numbering about 15/20 persons, fastening with different colour clothes and wearing different colour apparels being armed with guns, arrows; bows, dao (sharp cutting weapons) came to his house for attacking. But when they had gone to another place in order to save their lives, the accused persons took away his three cows forcefully at the time of leaving his house. It has also been stated that the accused persons also took away two more cows forcefully from the house of one Gopendra Debnath (P.W.7). The informant also urged for rescuing his cows in the aforesaid FIR.

4. The said FIR was registered as Kalyanpur P. S. Case No. 71 of 2000 and after completion of investigation, the police submitted charge-sheet against the accused Petitioners for commission of offence punishable under Sections 148/447/392, IPC read with 149, IPC. The learned SDJM, Khowai on perusal of the materials available framed the charges against the accused Petitioners under Sections 148/447/392, IPC read with Section 149, IPC.

5. To bring home the charges, the prosecution examined as many as seven witnesses, but the accused Petitioners did not adduce any evidence in their defence. They pleaded not guilty to the charges framed against them and claimed to be tried.

6. The learned trial Court after completion of trial found both the accused Petitioners guilty of the offences punishable u/s 448/392, IPC and accordingly convicted and sentenced them as stated supra.

7. Having felt aggrieved by and dis-satisfied with judgment of conviction and sentence passed by the trial Court, the accused Petitioners preferred an appeal before the learned Additional Sessions Judge, West Tripura, Khowai. Upon hearing the learned Counsel for the parties and considering the evidences on record, the appellate Court upheld the judgment and order of conviction and sentence passed by the trial Court, and dismissed the appeal. Hence the present revision petition.

8. Mr. Dutta, learned Counsel for the accused Petitioners while supporting the contention made in the revision petition would contend that both the Trial Court as well as Appellate Court failed to appreciate the evidence on record and convicted and sentenced them fully on imaginary ground without properly considering the evidence on record. According to him," neither the P.W. 1, the informant, disclosed nor the trial Court tried to know whether the present Petitioners were known to the informant earlier and how he could identify the, accused Petitioners when they were along with others allegedly fastened with colour clothes. He further contended that the P.W. 1, the informant neither disclosed in the FIR nor in his evidence before the Trial Court that he informed regarding the identification of the present Petitioners to other co-villagers who were examined by the prosecution including P.W. 7 that the accused Petitioners

also took away two cows of P.W. 7, when the P.W. 7 did not disclose the same before the Court, rather P.W. 7 specifically stated in his cross-examination that he was never asked by the police about this case.

9. Mr. Dutta further submits that the prosecution even not examined the I.O. of the case and non-examination of the I.O. deprived the Petitioners from cross-examining him and testing the veracity of the evidence of P.W. 7 who in his evidence stated that he saw one of the accused Petitioner, namely, Prabhat Marak taking one of the cattle of the informant, but nowhere stated that his cattle was taken away by the accused Petitioners. In his cross, P.W. 7 also stated that there was no talk between young persons of two communities i.e., the tribal and the Bengali after the Danga (communal riot) of 1997. Therefore, it cannot be ruled out that the informant tried to falsely implicate the present Petitioners being they belonged to tribal community.

10. His further contention is that P.W. 2 to P.W. 5 are not the eye-witness, they only stated before the Trial Court that they came to know regarding the alleged incident from the informant P.W. 1 that some miscreants had attacked their house and stolen cattle of him and he could identify the present Petitioners, but the P.W. 1 nowhere stated that he, disclosed the aforesaid facts to any of the prosecution witnesses which creates a doubt regarding his evidence, consequent thereto, the case of the prosecution and for such doubt, according to this Court, the present Petitioners are entitled to be acquitted, even if not clear acquittal, but acquittal on benefit of doubt.

11. The learned Counsel for the Petitioners also urges that the prosecution did not give any explanation for non-examination of the I. O., particularly who registered the case and recorded the statements of the witnesses u/s 161, Code of Criminal Procedure. According to him, non-examination of the I.O. is fatal in nature as due to such non-examination the Petitioners are deprived from their right to cross-examine him. Not only that even to contradict the evidence of P.W. 7 who on the one hand in his evidence stated that he saw one of the Petitioner, namely, Prabhat Marak, on the other way stated in his cross, that he was never asked by the police regarding this case as the statements of P.W. 7 implicating the Petitioner Prabhat Marak is nothing but an approved version first time in the Court which is not admissible as per the Evidence Act.

12. He also contended that the trial relating to the accused Petitioner Prabhat Marak is wholly vitiated being at the time of commission of offence, he was a juvenile and covered by the provisions of Section 7 of the Juvenile Justice (Care and Protection of Children) Act, 2000, as amended. The accused Petitioner was only about 10 years at the time of alleged commission of offence and being juvenile, the Juvenile Justice Board is only empowered to try him, not by a regular Court like the Court of SDJM. He again contended that as per provisions of Section 7 of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended, when a juvenile or a child is brought before a regular Court, then the duty of the Court is to record the age of the accused person and without any

delay send him to the Juvenile Justice Board, or to the Special Court as established by the Government or any home established by any voluntary organization with an agreement with the state Government. But in the instant case, nothing was done by the trial Court. To prove the Petitioner Prabhat is a juvenile, he placed reliance on Annexure-C to the revision petition, a Transfer Certificate issued by the Headmaster, Mayong Bekereng Kusum Para Senior Basis School, wherein the date of birth of the Petitioner Prabhat Marak has been mentioned as 5-8-1990.

13. In support of his contention, Mr. Dutta, again submits that in a case of juvenile what has to be done by the Court below has been discussed by a Division Bench of the Gujarat High Court in the case of Gaurav Pradip Verma Vs. State of Gujarat, taking note of various decisions of the Apex Court.

14. Mr. Dutta finally contended that it would be evident from the examination of the accused Petitioners u/s 313, Code of Criminal Procedure that the trial Court even did not record the age of the accused Petitioners while recording the statement of the accused Petitioners jointly and recording of joint statement of the accused Petitioners u/s 313, Code of Criminal Procedure is also not permissible under law. The reason is that the accusation must be specific and the Court should put the question on specific incriminating evidence to the accused concerned.

15. Per contra, Mr. D. Sarkar, learned P. P. while resisting the contention of Mr. Dutta relating to the juvenility of the accused Petitioner Prabhat at the time of commission of offence, would contend that neither before the trial Court nor before the appellate Court, the present Petitioners took the plea of juvenility and place the certificate as a proof which is annexed to the revision petition, therefore, neither the trial Court nor the appellate Court got any opportunity to decide whether the present Petitioner Prabhat was a juvenile or not at the time of commission of offence.

16. Mr. Sarkar further submits that non-examination of the I.O. in no way prejudiced the accused Petitioners, as the investigating authority is only to conduct the investigation, not to make any statement against the accused persons. When in the instant case, the prosecution witnesses, particularly, P.W. 1 identified both the accused Petitioners and the P.W. 7 identified the accused Petitioner Prabhat, it cannot be said that the prosecution failed to prove its case.

17. Learned Counsel Mr. Dutta for the Petitioners has pointed out that the Petitioner Prabhat was a juvenile at the time of alleged commission of offence For determination of the age of a juvenile, the reckoning date would be the date of commission of offence and not the date when he is produced before the Court and if the Court finds an accused person to be a juvenile on the date of commission of offence, then it shall forward the juvenile to the Juvenile Justice Board or any other appropriate authority for passing appropriate orders. But in the instant case, after such a long period of ten years, it is not a fit case to refer

the Petitioner Prabhat to a Juvenile Justice Board, and by this time, the Petitioner Prabhat has also attained his majority, moreso the evidence on record also do not suggest for sending the accused for determination of his age and refer to Juvenile Justice Board.

18. This Court has gone through the judgment of the trial as well as the appellate Court as impugned and also the evidence of the witnesses on record and the statement of the accused Petitioners recorded u/s 313, Code of Criminal Procedure by the Trial Court. As the trial Court as well as the appellate Court convicted the present Petitioners mainly relying on the evidence of P.W. 1 and P.W. 7, it would be proper to reproduce the salient portion of their evidence. Accordingly, the same is reproduced as under:

P.W. 1 stated in his evidence that "on 30-6-2000, at about 2.30 p.m. I was in my house. At that time, some miscreants attacked our house, opened fire and while retreating took away two heads of cattle. Out of the miscreants, I could identify two persons namely, Prabhat Marak and Kishore Marak. Accused Kishore Marak is present in the Court while another is found absent. After two days of the incident I informed the matter to the P. S. in writing...."

In his cross, he stated that "there was a communal riot at the time of incident. The delay of lodging the case was not mentioned in the petition. There is a school (Sr. Basic) at south-west corner, of my house at a distance of 2/3 kani land. There are three houses in the east of my house. Some refugees were in the school because of the Danga. About 20/25 miscreants attacked our house. Accused persons are also the residents of our village. There is a main road in the name of Garu Bari road in the south of my house. It is not a fact that accused as stated was not involved in this case, and I submitted a false case against the accused persons."

P.W. 7 in his deposition stated that "on 30-6-2000 at about 2 p.m. some miscreants being armed with dao, lathi and gun attacked our house and opened fire. Out of fear, we took shelter in the nearby jungle. Thereafter, I saw that Prabhat Marak was taking one head of cattle of the complainant. I know the accused Prabhat Marak earlier from the incident.

In his cross, he stated that "I was not asked by police about this case. The complainant is my neighbour. I know Kishore Marak also who is a resident of our village. There was no talk between young persons of 2 communities i.e. the tribal and the Bengali, after the Danga of 1997. It is not a fact that I did not see accused Prabhat Marak to take catties of the complainant. It is not a fact that the complainant is my relative. It is not a fact that I am deposing false because of Danga.

19. It appears from the evidence of P.W. 1 that in his statement, he nowhere stated that he disclosed regarding the incident to any of the witnesses. Therefore, the evidence of P.W. 2, 3, 4, 5, and 6 cannot be taken into consideration being they are not eye-witnesses, only the hearsay witnesses that

also not confirmed by the person from whom they allegedly heard the incident i.e. P.W. 1, which is necessary as per law.

20. The evidence of P.W. 7 also cannot be relied upon, he himself having stated that he never made any statement before the I.O. of the case. Therefore, his statement before the Court implicating the accused Prabhat is nothing but an improved version i.e. first time before the trial Court. It is settled position that on the basis of the approved version of a witness, it would not be safe for the Court to convict a person. Perusing the statement recorded by the Trial Court u/s 313, Code of Criminal Procedure this Court has no other option except to express its unhappiness regarding functioning of the trial Court as the trial Court has failed to consider the statutory provisions by which the Legislature provided an opportunity to an accused to answer regarding the incriminating materials against him brought by the prosecution witnesses and recorded by the Court which would be used against him.

21. When in a trial, there is more than one accused, then they should be examined separately in regard to each material circumstances appearing against each of them. The narration of evidence jointly in a mechanical fashion would not sub-serve the requirement that the question should be put in the language of accused but according to this Court, question should be put to an accused in his own language so that he can understand what the evidence is available against him and if the question is put by the Court in other language than the language understood by the accused, in that case, the Court should explain the evidence incriminating him with the alleged offence.

22. So, evidence which will be used against an accused has to be put to him specifically, as there should not be any vagueness in the question put while examining u/s 313 of the Code of Criminal Procedure This Court is of the firm opinion that while recording statements of all the accused persons u/s 313, Code of Criminal Procedure jointly at a time, putting common question is not permissible.

23. Purpose of examination of the accused u/s 313, Code of Criminal Procedure has also been discussed by this Court in Dulal Ch. Baidya Vs. State of Tripura, and this Court also noted the observation of the Apex Court held in para 22 of the judgment in the case of S. Harnam Singh Vs. The State (Delhi Admn.), as under:

22. Section 342 of the Code of Criminal Procedure, 1898, casts a duty on the Court to put, at any enquiry or trial, questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in evidence against the accused is required to be put to him specifically, distinctly and separately....

24. In the instant case, admittedly, the trial Court did not examine the accused Petitioners separately while recorded the statement u/s 313, Code of Criminal

Procedure rather examined jointly and put common questions to the accused Petitioners jointly, which are as follows:

Examination of accused namely Shri Kishore Marak and Shri Prabhat Marak u/s 313 of Code of Criminal Procedure

Question: It reveals from the evidence of P.W. No. 1 and P.W. No. 7 that on 30-6-2000 A.D. last at noon about 2.30 O'clock you all had attacked in the house belonging to the witnesses and opened fire in there. And you had stolen away 2 (two) cows.

What do you get to say regarding this ?

Answer: the evidence given by the witnesses is not true.

Question: It reveals from the evidence of P.W. No. 2, P.W. No. 3, P.W. No. 4. P.W. No. 5 and P.W. No. 6 that the complainant of the instant case named Shri Manilal Debnath told the witnesses that you all had attacked in the house belonging to the witnesses and you had theft 2 (two) cows from there.

What do you get to say regarding this ?

Answer: Not true

Question: Do you want to say anything in respect of allegation instituted against you all in the instant case ?

Answer: No.

Question: Would you cite the defence witness ?

Answer: No.

The above statements have been made by the accused in my presence and within my hearing and have been corrected by me.

Sd/- Illegible, 13/6 S.D.J.M., Khowai West Tripura

According to this Court, the learned trial Court recorded 313 statement of both the accused Petitioner jointly which is wholly contrary to the provisions of law and against the principles of criminal jurisprudence. The Court should have examined them separately u/s 313, Code of Criminal Procedure

25. In Balai Natta Vs. State of Tripura, while considering the appeal . of the Appellant and examining the judgment impugned therein, this Court has found that the learned Additional Sessions Judge, Court No. 2, West Tripura though put question to the accused person as well as signed the statements, but did not record the statements of the accused. This proves that the learned trial Court was not at all serious while recording the statements of the accused u/s 313 of the Code of Criminal Procedure, or not thoroughly aware how a statement u/s 313, Code of Criminal Procedure has to be recorded and what is the responsibility of a Court in a criminal trial. Unless the Court places itself in the

place of justice seeker, it cannot discharge its duties cast upon it by the law makers. The trial Court should be very careful when they are examining an accused u/s 313, Code of Criminal Procedure as by this provision, the legislature provided an opportunity to an accused for receiving natural justice from the Court. In the Balainatta (supra), this Court while discussed about examination of the accused u/s 313, Code of Criminal Procedure took note of the decisions of the Apex Court in Hate Singh Bhagat Singh Vs. State of Madhya Bharat, and the case of Basavaraj R. Patil and Others Vs. State of Karnataka and Others, and Lattu Mahto and Another Vs. The State of Bihar (Now Jharkhand),

26. It would be proper for the Trial Court to take note of the aforesaid cases before recording the statement of the accused u/s 313, Code of Criminal Procedure On further scrutiny of the evidence as stated above, it cannot also be ruled out that when there was some communal disharmony, men of one community may implicate the men of other community falsely, what, in fact, was, perhaps, tried to be in the instant case. Therefore, though the case in hand is not a case of complete acquittal, but, undoubtedly, regarding involvement of the present Petitioners creates a doubt in the mind of this Court.

27. On analyzing the entire evidences on record, it appears that the participation of the accused Petitioners has not been explained beyond all reasonable doubt. If the evidence of P.W. 1 and P.W.7 be seen in the entirety of the case, then also doubt remained unchanged in view of the contradiction in the evidence of P.W. 1 as well as in the evidence of P.W. 7 as the P.W. 7 did not corroborate the statement of the P.W. 1, inter alia, that two cows were stolen by the accused Petitioners forcibly from the house of P.W. 7, even P.W. 7 did not make any statement in this regard to the police nor did he state anything in this regard in his evidence before the trial Court. Therefore, the identification of the accused Petitioner Prabhat by the P.W. 7 has also not remained intact. In these circumstances, the prosecution case has become doubtful and if a doubt is created on the prosecution version, then the benefit of doubt is to be given to the accused, it cannot go in favour of the prosecution. Accordingly, it can be safely said that the prosecution has not been able to prove its case beyond all reasonable doubt. In the result, the judgment and order of the appellate Court as well as trial Court as impugned in the instant case are hereby set aside. As both the Petitioners are on bail, they are discharged from the liabilities of their bail bonds.

28. The revision petition is accordingly allowed and disposed of.

29. Let the lower Court record be sent back to the Court concerned.