(2008) 08 JH CK 0151

In the Jharkhand High Court

Case No : Criminal (Jail) Appeal No. 415 of 2007 (SJ)

Puran Giri @ Puran Mandal APPELLANT

Vs

State of Jharkhand RESPONDENT

Date of Decision : 05-08-2008

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 374(2)
Evidence Act, 1872 — Section 24, 25, 26, 27, 3
Penal Code, 1860 (IPC) — Section 395

Citation : (2009) 57 BLJR 430

Hon'ble Judges : Ajit Kumar Sinha, J

Bench : Single Bench

Advocate : Rakesh Kr. Sinha, for the Appellant; Mahua Palit, A.P.P, for the Respondent

Judgement

Ajit Kumar Sinha, J.—This Criminal Appeal has been preferred from jail against the judgment and order of conviction and sentence dated 30th October, 2006 and 31st October, 2006 respectively, passed in Sessions Case No. 232 of 2005, arising out of Jama Police Station Case No. 110 of 2004, whereby and whereunder, the learned 5th Additional District & Sessions Judge, Dumka (F.T.C.), while acquitting one of the accused, namely, Santosh Kumar Mandal of the charges, has convicted the appellant and one another for the offence u/s 395 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for seven years each and further imposed a fine of Rs. 1000/- each and in default of payment to further undergo simple imprisonment for three months each.

2. The prosecution case, which is based on the Fard-beyan (Ext. 1/1), given by one Jona Kisku (PW 5) before the then Sub Inspector of Police, Jama Police Station, on 7.12.2004 at about 11.45 a.m., in brief, is set out as under:

The informant Jona Kisku (PW 5) was sleeping along with his family members at about 11.30 p.m. on 6.12.2004, he woke up due to disturbance and asked for a torch from his wife Mayansi Paswan (PW 1) who started searching. Meanwhile, the miscreants came to him and pointed out a dagger and asked for Sona because his name was written in the voter list as Sona Kisku. Thereafter, they overpowered him and threatened his wife and children to kill. On raising Hulla, the miscreants took away one Philips Radio, Philips Two-in-One Tape-recorder, two ladies H.M.T. watches, two Banarsi Sari along with other Saries (40 pieces), paint-shirt, house hold utensils and Rs. 21,000/- in cash as well as golden and silver jewellaries. Thereafter, the charged persons entered into the house of his nephew, which was towards the west of his house and took away Rs. 13,000/- in cash, house-hold utensils, jewellaries etc. On the basis of this information, Jama Police Station Case No. 110 of 2004 was registered for the offence u/s 395 of the Indian Penal Code and the then Sub Inspector of Police Mr. Anil Kumar investigated the matter and during course of investigation, accused Ganesh Pujhar was apprehended.

3. The case of the prosecution is that based on the confessional statement of co-accused Ganesh Pujhar the name of other co-accused, including the appellant, cropped up. He also disclosed about whereabouts of the looted articles and, accordingly, Test Identification Parade was conducted and the articles were identified, which led to arrest of other co-accused, including the appellant herein. The prosecution case is that the appellant herein was also identified in the Test Identification Parade and charge sheet was, accordingly, filed before the learned 1st Additional Sessions Judge, Dumka and ultimately the records were later transferred to the file of learned Sessions Judge, Dumka for trial.

4. In the instant case the prosecution has examined altogether six witnesses, namely, PW 1 (Nenansi Paswan), PW 2 (Churki Soren), PW 3 (Deepali Kisku), PW 4 (Charlis Kisku), PW 5 (Sona Kisku) and PW 6 (Shiv Narayan Ram, I.O. of this case). PW 1 (Nenansi Paswan) is the wife of the informant PW 5 (Sona Kisku) whereas PW 4 (Charlis Kisku) is a constable and next-door neighbour of the informant. Certain documents have also been exhibited as Ext. 1 (signature of Sona Kisku on the Fard-beyan) and Ext. 1 (Fard-beyan).

5. The learned Sessions Judge on considering the evidence and the confessional statement of the accused, which led to recovery of the stolen articles, held that it was an admissible evidence u/s 27 of the Evidence Act because of the corroborative evidence like seizure of articles and subsequent identification by the informant side and it also held that based on that the case was instituted against unknown 10 to 12 miscreants.

6. As already submitted, three persons, including the appellant herein, were named in the charge sheet as accused and the investigation was still going on. According to the informant (PW 5), he saw the appellant in torch light and identified the accused. He has also stated that he identified the accused present in the dock as well, and none of the witnesses has stated anything contrary to disbelieve the commission of dacoity in the house of the informant (PW 5). The prosecution case is that during investigation the looted articles were recovered

on the basis of confessional statement of Ganesh Pujhar. Further case of the prosecution is that PW 6 (the Investigation Officer) has stated that Ganesh Pujhar was arrested and on his confessional statement, names of other eight co-accused persons were given and the present appellant is one of the accused. It has also been stated that one Khakhi full paint and one torch were recovered from his house for which Test Identification Parade was conducted and the informant (PW 5) identified the articles, belonging to him, on 22.9.2005. According to the prosecution, the informant has also corroborated the evidence by stating that the Test Identification Parade regarding the articles was conducted and he has identified the same and, thus, the confessional statement stood corroborated and it was a valid piece of evidence. The prosecution has further stated that with regard to accused-appellant herein, Test Identification Parade was conducted and the informant identified him as the person, who had pointed out knife on his neck. The prosecution further submits that as regards other co-accused Santosh Kumar Mandal even though the Test Identification Parade was not conducted but he was identified by some of the witnesses for the first time in court. PW 6, is the Investigating Officer, who took charge only on 14.06.2005 and continued with further investigation of the case, which was earlier investigated by the then Sub Inspector of Police Anil Kumar, who was not even examined. According to the prosecution, based on the confessional statement and the recovery of the looted articles of the informant (PW 5), as deposed by the Investigating Officer (PW 6), it becomes an admissible evidence as per Section 27 of the Evidence Act, since the confessional statement gets corroborated, leading to recovery of some looted goods.

7. According to the defence case, as put forward, there was previous enmity regarding digging well in Village-Nayadih for which contract was given to the informant by Baiznath Pujhar and he left the work midway. It was in these background that he was falsely implicated in this case.

8. However, the learned Sessions Judge distinguished the case of the appellant herein vis-a-vis Santosh Kumar Mandal and held him guilty and convicted him.

9. The learned Sessions Judge has held that if a recovery is made based on the confessional statement of an accused, the same is admissible u/s 27 of the Indian Evidence Act. It has also held that it becomes a corroborative evidence upon seizure of looted articles and subsequent identification by the informant. There is no dispute with regard to the settled law on interpreting Section 3 read with Section 27 of the Evidence Act. However, in the instant case the main contention raised by the defence was that there was no recovery of the looted articles from the appellant instead the recovery was from the house of the co-accused itself, who had given the confessional statement.

10. The learned Sessions Judge considered the entire case of the prosecution and the statements of the witnesses, including the Fard-beyan and the confessional statement as well as other exhibits and came to the conclusion as far as Santosh Kumar Mandal is concerned, nothing has been recovered from his possession and

his name has come only on the basis of confessional statement of the co-accused. It has held that as per Section 30 of the Evidence Act when persons more than one are being tried jointly for the same offence, and the confession made by one of such persons affecting himself and other co-accused is proved, the Court may take into consideration such confession as against such other co-accused. Based on the aforesaid document, the learned Sessions Judge has come to the conclusion that using Section 30 of the Evidence Act, the confessional statement, based on which Santosh Kumar Mandal was implicated as co-accused, is without any corroboration or identification since he was not even called for Test Identification Parade and there was no recovery. Thus, in absence of corroborative evidences, his involvement in the occurrence of dacoity, has not been proved and Section 30 of the Evidence Act does not apply and it is in these background that he was held to be not guilty and acquitted by the learned Sessions Judge.

11. The present appellant has preferred this appeal u/s 374(2) of the Code of Criminal Procedure, challenging the impugned judgment and order of conviction and sentence dated 30.10.2006 and 31.10.2006 respectively, passed by the learned 5th Additional Sessions Judge (F.T.C.), Dumka.

12. Learned Counsel for the appellant, who appeared as Amicus Curiae, has raised the following contentions to be considered by this Court for assailing the impugned judgment and order of conviction and sentence, passed by the learned Additional Sessions Judge. According to him, there is a clear cut discrimination vis-a-vis Santosh Kumar Mandal and the present appellant in view of the fact that Santosh Kumar Mandal has been acquitted while the present appellant has been convicted. The similarity with regard to two co-accused, namely, the present appellant and Santosh Kumar Mandal, as argued by the learned Counsel for the appellant, is set out as under:

Both were named by the co-accused Ganesh Pujhar and were made accused in the case on the basis of his confessional statement. According to him, nothing was recovered either from Santosh Kumar Mandal or from the present appellant and the recovery of looted articles was from the house of only Ganesh Pujhar, who has made the confessional statement and, thus, it was not an admissible evidence u/s 27 of the Evidence Act. The second contention raised is that even though the incident is of December, 2004 whereas the Test Identification Parade took place on 21.9.2005 i.e. after a lapse of nine months in which it is alleged that the present appellant was identified. According to the appellant, such identification will be deemed to be tainted and cannot be a valid piece of evidence and in any case, as per the settled law, it is only to be used for the purposes of corroboration and cannot have any evidentiary value. According to PW 5 he had seen the appellant in a troch light nine months back. It is also the contention of the appellant that even otherwise this Test Identification Parade could not be proved since it was not exhibited and, thus, it was not a valid piece of evidence. The appellant further submits that the informant as well as the appellant were called at the police station in the month of April, 2005 itself and the informant saw the present appellant and, thus, the Test Identification Parade was of no consequence. He has also referred to certain judgments, passed by the Hon''ble Patna High Court as well as this Hon''ble Court.

13. Another important submission is that even the Investigating Officer, who had recorded the entire Fard-beyan, was not even examined whereas the new Investigating Officer, who joined the police station only in the month of June, 2005 was examined as PW 6.

14. Learned Counsel for the appellant while relying on a decision, rendered in the case of Sanjay Kumar v. State of Bihar reported in 1999 (2) P.L.J.R. 875 submitted that such Test Identification Parade after a lapse of long period is deemed to be tainted and cannot be considered even for the purposes of conviction. He has also referred to a decision of this Hon''ble Court, rendered in the case of Sk. Khusdil v. State of Bihar (Now Jharkhand) reported in 2003 (3) JLJR 364, wherein it has been held that conviction based on such tainted Test Identification Parade is a very weak piece of evidence and until it is corroborated, it cannot be taken into consideration. It has further been submitted that unless the same is proved by way of Exhibit, it cannot be held to be proved for the purposes of conviction.

15. Counsel for the State submits that in any case, confessional statement can be used as a piece of evidence if the stolen articles were recovered. But that is not the case in the present facts and circumstances.

I have considered the submission and before entering into the merits of the case, it is relevant to refer Section 9 of the Evidence Act, which deals with the facts necessary to explain or introduce relevant facts. The Hon''ble Supreme Court has held in AIR 2002 SC 1192 (Ayyub etc. v. State of U.P.) that Test Identification Parade as such is not at all a substantive piece of evidence, but it is done only for the satisfaction of the prosecution that the investigation was moving in the right direction. In the instant case, the position is worst. The identification is not only tainted but is highly belated i.e. almost over nine months and thus, the same could not have been taken into account for the purposes of convicting the appellant herein. It is further relevant to refer to Sections 24 and 25 of the Evidence Act, which deals with confession of one accused, when admissible against other. In fact Sections 24 to 26 of the Evidence Act form a trio containing safeguards against the accused persons being induced or coerced to confess a guilt. Here is a case where even on confessional statement of an accused nothing has been recovered from the residence of the accused instead it was recovered from the accused, who made the confessional statement. Having considered Sections 3, 27 & 30 of the Evidence Act, I find that the learned Additional Sessions Judge has completely misdirected itself and has rather erred in interpreting Sections 3, 27 and 30 of the Evidence Act, the law with regard to which is well settled.

16. Even u/s 30 of the Evidence Act, the confession cannot be treated as an evidence within the meaning of Section 3 against the co-accused and it is not obligatory on the court to take it into account. The test is to see whether it is sufficient by itself to justify the conviction of the person. The Hon''ble Supreme Court at paragraph Nos. 31 and 32 of the judgment, rendered in the case of Mohd. Khalid Vs. State of West Bengal, , while interpreting Section 30 of the Evidence Act, held as under:

The requirement of Section 30 of the Evidence Act is that before it is made to operate against the co-accused the confession should be strictly established. In other words what must be before the court should be a confession proper and not a mere circumstance or an information which could be an incriminating one. Secondly, it being the confession of the maker, it is not to be treated as evidence within the meaning of Section 3 of the Evidence Act against the non-maker co-accused and lastly, its use depends on finding other evidence so as to connect the co-accused with the crime and that too as a corroborative piece. It is only when the other evidence tendered against the co-accused points to his guilt then the confession duly proved could be used against such co-accused if it appears to effect (sic) him as lending support or assurance to such other evidence.

17. Again in the case of The Government of N.C.T. of Delhi Vs. Jaspal Singh, , the Hon''ble Supreme Court at paragraph No. 9 of the judgment while considering Section 30 of the Evidence Act held as under:

No doubt, in law the confession of a co-accused cannot be treated as substantive evidence to convict, other than the maker of it, on the evidentiary value of it alone. But it has often been reiterated that if on the basis of the consideration of other evidence on record the court is inclined to accept the other evidence, but not prepared to act on such evidence alone, the confession of a co-accused can be pressed into service to fortify its belief to act on it also.

18. In the instant case the alleged recovery has been made from the house of Ganesh Pujhar, the co-accused, who has made the confessional statement. u/s 27 of the Evidence Act the extent of the information admissible mandatorily depends on the exact nature of the fact discovered to which such information is required to relate. The prosecution has to lead best evidence to prove that the disclosure statement of the accused led to recovery of crime article. The disclosure statement made by an accused cannot be used against other accused as has been held by the Hon''ble Supreme Court in the case of Sukhvinder Singh and Others Vs. State of Punjab, .

19. It is further relevant to point out that u/s 27 of the Evidence Act unless the information received from accused is proved, it cannot be said to be a piece of evidence. In the instant case, the admitted fact remains that it was neither exhibited nor proved. Section 27 of the Evidence Act is an exception to Sections 25 and 26 of the Evidence Act and is a proviso to Section 26 of the Evidence Act. It makes admissible so much of the statement of the accused, which leads to

discovery of a fact deposed to by him and connected with the crime irrespective of the question whether it is confessional or not. The essential ingredient is that the information given by the accused himself must lead to recovery. Unfortunately in the instant case, it is an admitted fact that nothing was recovered based on the confessional statement from the present appellant and, thus, even the essential ingredient is lacking to infer or apply Section 27 of the Evidence Act.

20. In the aforesaid background, the impugned judgment and order of conviction and sentence dated 30.10.2006 and 31.10.2006 respectively, passed by the learned 5th Additional District & Sessions Judge, Dumka (F.T.C.) in Sessions Case No. 232 of 2005, arising out of Jama P.S. Case No. 110 of 2004, are held to be erroneous, illegal and against the well settled principles and provisions of Evidence Act and are, accordingly, set aside. The appellant is acquitted of the charges and is held to be not guilty for the offence u/s 395 of the Indian Penal Code. The appellant, who is in custody, is directed to be released forthwith, if not required in any other case.

