

(2008) 06 OHC CK 0039
In the Orissa High Court

Ramesh Chandra Panda

APPELLANT

Vs

State of Orissa and Others
 Suresh Chandra Jena and
Others Vs State of Orissa

RESPONDENT

Date of Decision : 20-06-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 396, 457

Citation : (2008) CLT 922 (Suppl CrI) : (2008) 2 OLR 372 : (2008) OLR 922
(Suppl CrI)

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Judgement

A.S. Naidu, J.—The judgment dated 23.12.1988 passed by the learned First Addl. Sessions Judge, Ganjam-Berhampur convicting the appellants of the charge u/s 457 I.P.C. and sentencing them to undergo R.I. for five years and to pay a fine of Rs. 2,0007-each and in default to undergo R.I. for three months more in S.T. No. 16 of 1988 is assailed in all these three Criminal Appeals.

2. Out of five appellants in Criminal Appeal No. 11 of 1989, two being appellant No. 2-Bhagirathi Jena and appellant No. 5-Bipin Kumar Mohanty having died in the meanwhile, the appeal is confined to appellant Nos. 1, 3 and 4, being Suresh Chandra Jena, Sarat Kumar Dhal ? Ranjeet and Durga Madhav Panda respectively.

Criminal Appeal No. 48 of 1990 has been filed by one Ramesh Chandra Panda who was the informant in the case, being aggrieved by the direction of the learned First Addl. Sessions Judge, Ganjam-Berhampur as to forfeiture of the seized gold (M.O. III and IV) to the State. According to the said appellant the gold ornaments belonged to the deceased and the plea of the defence that the same belonged to the mother of the accused appellant having been negatived the Court below ought to have directed return of the said gold ornaments to the accused appellant instead of directing to forfeit the same.

As the facts and points of law involved in all these three appeals are same the same are heard together with consent of learned Counsel for the parties.

3. Bereft of unnecessary details the prosecution case in short was that Smt. Annapurna Panda, after death of her husband remained alone in her house. She was an orthodox and conservative lady. She was always maintaining distance from others and was commonly called as "Chuin Chuin Budhi". She was last seen on 13.11.1987 and thereafter none of her neighbours saw her for about three to four days. They found that the house was locked from inside. On 18.11.1987 suspecting some foul play the neighbours informed the police and her brother. On being informed, in presence of police they forced open the house and found the old lady lying dead. Thereafter telegrams were sent to her children who came and found that some valuable materials like "Khasamali" weighing about 9 tolas were missing from the neck of the deceased and so also some money kept in a steel almirah along with other gold and silver ornaments. Her son P.W. 1 lodged an F.I.R. (Ext. 1) and on the basis of the same criminal action was set in motion. It appears that the brother of deceased Brajamohan Panigrahi also lodged another F.I.R. which, was marked as Ext. 12. In course of investigation, it was alleged that some of the appellants had made an extra-judicial confession before P.Ws. 8 and 9 and on suspicion police arrested them and it was alleged that they had also confessed their guilt before police. On the basis of the materials available and seizure of stolen articles from the Goldsmith, charge-sheet was filed u/s 396, I.P.C. against five accused persons.

The plea of the accused persons was complete denial.

4. According to accused persons they had been unnecessarily involved in the case without any reason. Accusad-Sarat Kumar Dhal specifically pleaded that the allegation that the "Khasamali" belonging to his mother was stolen was not correct. To substantiate its case the prosecution got 17 witnesses examined. Out of them P.W.1 was the son of the deceased who came to the village after being informed by P.W. 11. P.W. 2 was the doctor who conducted post mortem of the dead body. P.W. 3 was the owner of the Jewellery shop at Icchapuram. P.W.4 was the goldsmith who extracted the impurities of gold from the "Khasamali". P.W.5 had purchased the prime gold converted into two lops having paid to accused Sarat Kumar Dhal a sum of Rs. 24,115/-. P.W. 6 was the identifier and an introducer of P.W. 10 before P.W. 3. P.W. 7 was a member of the Governing Body of the School before whom accused Sarat Kumar Dhal, Bipin Mohanty and Durga Madhava Panda had said to have been made extra judicial confession. P.W. 8 was a retired Asst. Sub-Inspector of Police before whom it was also alleged that the three accused persons named above had confessed their guilt. P. W. 9 was a seizure witness. P.W. 10 was a witness with whom accused Sarat Kumar Dhal had been to Icchapuram to sell the gold ornaments. P.W. 11 was the brother of the deceased. P.W. 12 was a witness who had seen the accused attending call of nature at about 9 P.M. near the house of the deceased. P.Ws. 13 and 14 were seizure witnesses. P.W. 15 was a witness who had stated to have seen Suresh Jena and Durga Panda near the house of Annapurna, the deceased. P.W. 16 was the brother of P.W. 1 who had identified the saree purchased by him for his wife and a Turkish Towel which was stated to have been stolen. P.W. 17 was the

Investigating Officer who had submitted charge-sheet against the accused persons.

5. Admittedly there was no eye-witness to the occurrence. After discussing the evidence in extenso and relying upon the statements of P.Ws. 7 and 8 before whom accused Bipin Mohanty, Sarat Kumar Dhal and Durga Madhava Panda were said to have confessed their guilt, coupled with seizure of material objects and other circumstances the learned First Addl. Sessions Judge, Ganjam, Berhampur held that the prosecution was able to prove that the accused persons had conjointly committed lurking house trespass by night with an intent to commit theft and did commit theft of gold, cash, saree, towel and other articles and accordingly convicted them of the charge u/s 457, I.P.C.

6. Mr. Mishra, learned Counsel appearing for the appellants strenuously took this Court through the evidence of all the witnesses and submitted that the Court below lost sight of certain vital aspects in the prosecution case. According to him there were two F.I.Rs. forthcoming, one being Ext. 1 lodged by P.W. 1 Ramesh Panda on 18.1.1987 and the other being Ext. 12 lodged on 17.11.1987 by the brother of the deceased. There were a lot of discrepancies between the averments made in both the F.I.Rs. According to Mr. Mishra the F.I.R.-Ext. 12 having been lodged earlier, prosecution ought to have proceeded on the basis of the same and not on the basis of the Ext. 1, the latter F.I.R. He further submitted that the evidence of P.Ws. 2, 3, 4, 7 and 8 could not be utilized against the appellants as one of the accused-Sarat had explained that the "Khasamali" which was seized belonged to his mother and she had given the same to him to sell and to utilize the sale proceeds for construction of his house. This piece of evidence according to Mr. Mishra has not been shaken. There were also no materials to come to a conclusion that the gold ornaments belonged to the deceased. So far as recovery of prime gold seized from Narasimha Rao - P.W. 10 is concerned in view of the discrepancy with regard to the colour of the stones of the two "Khasamalis" Mr. Mishra submitted that it could not be safely concluded that the "Khasamali" belonged to the deceased was stolen by any of the appellants and was sold to P.W. 10. That apart it is stated that "Khasamali" was a very common ornament used in southern part of the Orissa (Ganjam District) and that the prosecution had totally failed to establish that the gold ornament seized was a "Khasamali" that belonged to the deceased and therefore, according to Mr. Mishra, the seizure of prime gold from P.W. 10 had no significance. So far as seizure of Saree and towel was concerned Mr. Mishra drawing attention of this Court to the T.I. Parade report submitted that in fact a "Gamuchha" was put for identification and thus basing upon identification of Saree and towel alone no conviction could be made. He further forcefully submitted that evidence of P.Ws. 7 and 8 before whom the accused persons were stated to have been made extra-judicial confession could not be accepted. Extra judicial confession is the weakest type of evidence. That apart the statements of P.Ws. 7 and 8 have not been corroborated by any other witnesses. On the whole, according to Mr. Mishra the Court below proceeded only on surmises and conjectures and the conclusions

arrived at not on cogent evidence, and it is a fit case where the order of conviction should be set aside.

7. Learned Addl. Government Advocate on the other hand relying upon the evidence of P.Ws. 7 and 8 submitted that both the said witnesses were men of credence and there were no materials to disbelieve the statements made by them. The trial Court discussed the evidence of both P.Ws. 7 and 8 In extenso. It had also the occasion to mark the demeanour of those two witnesses and it arrived at a conclusion that the statements of the said witnesses could be safely relied upon. It is needless to sty that In the case at hand there was no eye witness. The prosecution case hinges upon the extra-judicial confession said to have been made by the three accused persons before P.Ws. 7 and 8 and seizure of Saree and Towel as well prime gold. Alter an ornament is melted and converted to prime gold it loses its identity. According to the prosecution the "Khasamali" belonging to the deceased was stolen and was converted to prime gold. On the other hand according to defence the mother of the accused-Sarat had given the "Khasmall" to him with instruction to sell the same and utilize the sale proceeds for construction of the house. One witness was examined to substantiate such plea. "Khasamali" being a very common gold ornament worn by the inhabitants of Ganjam District it could not be safely said as to whether the one alleged to have been stolen belonged to the deceased or mother of Sarat.

8. The trial Court however, after discussing the evidence in extenso and relying upon the evidence of P.Ws. 3, 4, 5, 7 and 10 as well as the other materials came to the conclusion that the prosecution was able to prove the charge against the accused persons. The trial Court also disbelieved the story of Sarat to the extent that his mother had given him "Khasamali" that was allegedly stolen. The defence story with regard to acquisition of "Khasamali" by Sarat if disbelieved the same will add strength to the prosecution case. Added to the aforesaid facts, it appears that a Saree and Towel which were stolen were also recovered and so also some of the currency notes from the accused persons. The Doctor's evidence and other materials however negative the case of any homicidal death. On a cumulative assessment of all the aforesaid evidence, this Court finds that the trial Court has not committed any error. Be that as it may, the incident in question occurred way back in the year 1987. Twenty-one years have passed in the meanwhile. Apart from the same out of five accused persons two have already died in the meanwhile. The other three had remained in custody between ten months and one year. All of them were very young at the time of occurrence. Efflux of time might have healed the hostility among the parties. That apart the order of conviction and sentence was hanging upon their head like a Damocles' Sword for all these years. That itself would be sufficient punishment.

9. Considering all these facts and circumstances this Court confirms the order of conviction but then reduces the substantive sentence to the period of imprisonment already suffered by the accused appellants. The sentence of fine and the default sentence are maintained. So far as Criminal Appeal No. 48 of

1990 is concerned the finding of the trial Court reveals that the informant could not successfully prove the story of theft of "Khasamali". Thus this Court is not inclined to interfere with the said finding in the impugned judgment.

All the three Criminal Appeals are accordingly disposed of.