
(2014) 09 CAL CK 0098
In the Calcutta High Court
Case No : CRA No. 011 of 2013

Saw Paw Kee

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 16-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374(2)
Foreigners Act, 1946 — Section 14A
Penal Code, 1860 (IPC) — Section 147, 148, 149, 186, 307
Wild Life (Protection) Act, 1972 — Section 50, 51

Citation : (2014) 09 CAL CK 0098

Hon'ble Judges : Asim Kumar Mondal, J

Bench : Single Bench

Advocate : G. Binnu Kumar, Advocate for the Appellant; S.K. Mandal and S.C. Mishra, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

Asim Kumar Mondal, J.—The present appeal u/s 374(2) of the Criminal Procedure Code, 1973 is directed against the judgment and order dated August 30, 2012 passed by learned Additional District Judge, Andaman & Nicobar Islands, Port Blair in Sessions Case No. 037 of 2011.

2. In the said judgment, the learned Trial Court convicted 26 appellants u/s 14A of Foreigners Act read with para 3 of FRA order 1963 read with section 50/51 Wildlife (Protection) Act, 1972 and u/s 147/148/149/186/307/353/34 of the Indian Penal Code.

3. The prosecution case in short is that on august 27, 2010 at about 1700 hours ASI Shiva Kumar ICOP Tirur made telephone call to S.I.K. Bhoominathan at Police Station Ograbraj informing that two persons namely Dinesh Biswas and Rejesh Das both of Kalinpur who are fishermen come at the outpost and inform that on August 26, 2010 both of them had been catching fish in the sea, noticed at Barabalu two boats kept anchored and in those two boats there were as many

as 30 Burmese nationals. As soon as the information was received from ASI Shiva Kumar, matter was informed to the senior officers. A team was formed for anti poaching operation. The anti poaching police team with the assistance of Dinesh Biswas and Rajesh Das proceed for the spot, armed with ammunition and torch light. In the morning at about 08:30 hours the team reached at the spot and at about 10:30 a.m. they located two boats having Burmese nationals, who were proceeded from that place. It was found that they were fleeing away. The police party chased them for long. When the police party reached near the Burmese boat, the Burmese people suddenly turned their boat in the water towards the boat of the police with an intention to knock down the boat. As a result their boat hit against the boat of the police party and the boat of the police party was just getting overturned but the persons who were controlling the boat anyhow kept the boat and did not allow it to sink in the water. The Burmese people again turn their boat to the police party and try to hit them again. The anti poaching team notice that the Burmese people were armed with axe, knife and they were uttering some words in their language. The police ask them for surrendering. They did not surrender. The police was compelled to order for blank fire in order to prevent them from attacking. The Burmese people again try to attack the police personnel and as a result police party were compelled to fire in order to save themselves. Two of the Burmese people sustain bullet injuries. Police found that they had collected huge quantity of sea wealth like as cucumbers, shells. The boat was loaded with rice, two drums full diesel, compressor machine, torcus, dah, kulhari etc. Inventory was prepared in presence of witness and the 24 Burmese nationals were arrested rest two were shifted to hospital for their treatment. The incident was reported to the police station and case was started and investigated. Police submitted the charge sheet. The Trial Court after framing charges recorded the evidence of three witnesses who are SI K. Bhoominathan, B. Siva Kumar and PC 99 B. Dilli Rao.

4. The Trial Court on the basis of the evidence on record and considering the facts and circumstances of the case as well as the inventories, has been pleased to pass the judgment impugned and convicted all the accused persons under the charges framed against them.

5. Being aggrieved and dissatisfied with the said order and judgment impugned, the convicts prefer the present appeal on the grounds that the learned Trial Judge fail to appreciate that no case is made out u/s 147/148/149/186/307/353/34 IPC and Section 50/51 Wildlife (Protection) Act, 1972.

6. Mr. G. Binnu Kumar learned advocate appears on behalf of the appellants. Mr. Kumar Submits that the learned Trial Court fail to appreciate that there was no evidence as to out of those two dinghies in which dinghy, the defacto complainant was boarded or in which the other witnesses were boarded. There was also no evidence on record to show that in which dinghy the appellant hit and tried to knock down the dinghy. It is also submitted that prosecution did not

choose to examine the Investigating Officer and thereby appellants deprived from the right to cross-examination of the Investigating Officer which adversely affected the right of the appellants. It is also submitted that as there is no evidence, that the appellants ever attacked the police personnel or any injury was sustained by the police personnel, on the contrary two appellants out of 26 sustain bullet injuries on the firing made by police party. There is no evidence that during the said course of firing by the police party any counter fire or counter attack was made. It is also submitted that prosecution examine three witnesses who are police personnel who are interesting witnesses. Mr. Kumar submits that the learned Trial Court had passed the order of conviction and sentence without applying judicial mind and without considering the fact that the appellants are merely fishermen. They might have come to catch fish and they are foreign national having no fire arms or any other deadly weapons. The weapons as recovered from them as alleged are usually use for catching fishes. Mr. Kumar finally submitted that the order of the sentences has been passed consecutively whereby it mean to say that the appellants are to suffer at least 20 years of imprisonment and to pay huge amount as fine.

7. Mr. S.K. Mandal learned senior counsel appears on behalf of the state and in support of the conviction. Mr. Mandal submits that the appellants admittedly are foreign national. There are evidence to show that the huge quantity of sea wealth i.e. sea cucumber was recovered from them which they might have the intention to sale in the foreign market. The appellants attacked the police personnel as and when they were asked to surrender. In order to stop them and to save the life of police personnel blank firing was done which causes the injuries on the legs of the two appellants. The intention of the police party is clear. Mr. Mandal left the matter of consideration on court as to the sentence passed by the learned Trial Court as to whether justify or not.

8. In the instant case, prosecution has examined three witnesses, admittedly they are police personnel. It also appears that two fishermen were also accompanied by the police party, they might have been examined as independent witness. However, prosecution fail to examine the alleged independent witnesses. It is also the fact that the prosecution could not examine the Investigation Officer. Failure to examine the Investigation Officer and any independent witness will not cause any prejudice to the defence. On careful perusal I did not find any contradiction has been taken to the witness which required to be confronted by the Investigating Officer. So in my considered view non examination of the Investigating Officer have not cause any prejudice to the defence. Admitted fact is that the appellants are foreign national. They had entered into the Indian Territory. A huge quantity of sea wealth are recovered. A inventory list was prepared by PW 1 and same has be exhibited by him. PW2 and PW3 are the direct witness of the incident. All the witnesses have supported and corroborated the prosecution case.

9. I am not happy with all the findings of learned Trial Court as reflected in the

judgment impugned, but at the same time I find there is nothing to interfere in the order of conviction in view of the fact that prosecution has properly and correctly place the case and put the evidences against the appellants.

10. I am told that the appellants are in custody about four and half years since their arrest till today. Learned Trial court has passed the order of sentence and conviction as follows:

"The appellants are to suffer rigorous imprisonment for 5 1/2 (five and half years) with a fine of Rs. 40,000/each i.d. to suffer rigorous imprisonment for 6 (six) months each for the offence u/s 14A Foreigners Act as amended, r.w.s. para 3 of FRA Order 1963 and they are further sentenced to suffer rigorous imprisonment for 4 1/2 (four years and six months) years with a fine of Rs. 50,000/- (Rupees fifty thousand only) in Indian currency each i.d. to simple imprisonment for 6 (six) months for the offence u/s. 50/51 of Wildlife (Protection) Act, 1972. The appellants were also sentenced to suffer rigorous imprisonment for 01 (one) year with a fine of Rs. 3000/- (Rupees Three thousand only) each i/d to SI for 6 (six) months each for the offence u/s. 147 IPC, they are further sentenced to suffer rigorous imprisonment for 2 (two) years with a fine of Rs. 3000/- (Rupees three thousand only) each i/d to SI for 6 (Six) months each of the offence u/s. 186 IPC, they are further sentenced to suffer rigorous imprisonment for 1 1/2 (one year and six months) with a fine of Rs. 2000/- (Rupees two thousand only) each i/d to SI for 4 (four) months each for the offence u/s. 353 IPC, and for the offence u/s. 307 IPC convicted persons are sentenced to suffer rigorous imprisonment for 07 (seven) years with a fine of Rs. 5000/- (Rupees Five Thousand only) each i/d to RI for 6 (six) months each, no sentence appears to be necessary for the offence U/s. 149 IPC consecutively."

11. I have no hesitation to hold that that sentences as passed above by the learned Trial Court is without application of judicial mind and without considering the facts that the appellants are foreign national. Learned Trial Court did not considered the fact that the appellants are foreign national and it is not possible for them to pay such fine.

12. Under the circumstances they are to suffer further imprisonment which will longer their stay in India. The sentence passed by the learned Trial Court appears to me whimsical and without application of judicial mind. There is a confusing language used by learned Trial Court indicating that the sentences awarded will run concurrently or, sentences will run consecutively. The sentence cannot run concurrently as well as consecutively. The term concurrently no doubt benefited the appellants.

13. Taking into consideration that the maximum period of sentence awarded to the appellants is seven years u/s 307 of Indian Penal Code, I find that the appellants have already suffered imprisonment of four and half years. Taking into consideration the period of imprisonment already suffered by the appellants they may be released treating sentences awarded to the appellants reduced to the

extent of period of sentences already suffered by them keeping the order of conviction up held.

14. Thus the appeal is partly allowed on contest without costs. The impugned order and judgment is hereby up held subject to modification as indicated above. The learned Trial Court is hereby directed to pass necessary order for releasing the appellants if no other matter is pending against them.

15. Send down the lower court record along with the copy of this Judgment to the learned Trial Court for taking necessary steps.