
Bhabagrahi Behera Vs State of Orissa

Criminal Revision No. 116 of 1978

Court: Orissa High Court

Date of Decision: May 14, 1979

Acts Referred:

Penal Code, 1860 (IPC) & Section 456, 457, 511

Citation: (1979) 48 CLT 135

Hon'ble Judges: N.K. Das, J

Bench: Single Bench

Advocate: H. Patel, for the Appellant; Addl. Standing Counsel, for the Respondent

Final Decision: Allowed

Judgement

N.K. Das, J.

The Petitioner and his brother were originally charged under Sections 456/511, Indian Penal Code. His brother has been

acquitted and the Petitioner has been convicted u/s 456, Indian Penal Code and has been sentenced to undergo R.I. for one month.

2. The prosecution case is that on 27-4-1977 the father of P.W. 1 died at mid-night. P.Ws. 2, 3, and 4 were coming on the road from the

cremation ground. They found the Petitioner sitting on the compound wall of the house of P.W. 1 and was attempting to jump down. These

witnesses, along with others, followed him and caught him on the way. He was questioned regarding his suspicious movement and he made extra-

judicial confession that he was attempting to commit home breaking at midnight. Accordingly, F.I.R. was lodged by P.W. 1 and after investigation

charge-sheet was submitted by the police.

The plea of the Petitioner is simple denial of the occurrence.

Both the Courts below have concurrently held that P.Ws. 2, 3 and 4 are consistent in their evidence that while they were coming from the

cremation ground at about mid-night, they found the Petitioner sitting on the compound wall of P.W. 1. After the Petitioner jumped down from the

wall he was caught by these witnesses. P.W. 1 was called and in their presence the Petitioner made the extra-judicial confession that he had gone

up the wall to commit theft in the house of P.W. 1 and accordingly he was convicted u/s 456, Indian Penal Code.

3. The prosecution has led evidence to show that previously there was theft in the house of P.W. 1 and also in the locality theft had taken place

about a month before the" alleged occurrence. The purpose of getting over the wall of P.W. 1 is said to be the intention to commit theft.

Prosecution wants to establish this by the extra-judicial confession said to have been made by the Petitioner before P.Ws. 1, 2, 3 and 4 P.W. 1 is

an advocate of the local Bar. P.W. 2 is his clerk. F.I.R. has been lodged by P.W. 1. There was no delay in lodging the F.I.R. Curiously enough the

fact of confession said to have been made by the Petitioner does not find place In the F.I.R. Taking into consideration the circumstances and

qualification of P.W. 1 and his clerk P.W. 2, it is quit natural that such an important fact cannot be omitted while lodging the F.I.R. No explanation

has been given by the prosecution for such omission.

4. Mr. Patel, the learned Counsel for the Petitioner, contends that even assuming the evidence of P.Ws. 2, 3 and 4 is true to the effect that the

Petitioner was found sitting on the compound wall of P.W. 1 and when he has not been convicted u/s 457, Indian Penal Code but has been

convicted u/s 456, Indian Penal Code and the intention for such offence has not been established, he is entitled to acquittal. In this connection, he

contends that the fact of extra-judicial confession appears to be an after-thought, inasmuch as when the F.I.R. is lodged by P.W. 1 who is a

practising advocate of the local Bar.

5. In Sankarsan Boral Vs. The State, , it has been held that if on the facts admitted, it is clear that the entry was made with intention of committing

some other offence, i.e. an offence different from that specified in the charge u/s 457, it may be open to the Court to convict him u/s 456, Indian

Penal Code as there would be no prejudice. But where the entry is not admitted and it is difficult to hold, on the facts proved by the prosecution

that the entry was effected with the intention of committing any offence, a Court will not be justified in conjecturing as to what the intention might

have been. Similarly, a Court will not be justified in saying that any entry into another man"s house at that hour of the night must necessarily cause

annoyance to the inmates of the house. There is always a sharp distinction between ""intention"" and ""knowledge"" in criminal law, and if it appears

that the intention with which the entry was effected was quite different even though the accused knew that his presence if detected would cause

annoyance to the inmates he cannot be held guilty of having entered another man"s house, with the intention of causing annoyance to the inmates. It

is not safe in such circumstances to surmise that the accused must have entered the house with some other specified object in view. This decision

has also been reiterated in a subsequent decision of this Court in *Niranjan alias Niranjan Agarwalla v. The State* 25 (1959) C.L.T. 200, and it has

been held therein that it will not be proper for a Court to indulge in a surmise if the entry was made for some other purposes and then to convict

him on the basis of such surmises. Both the aforesaid cases decided by this Court relate to the fact where the accused had concealed himself inside

the house, in one case inside the kitchen and the other case inside the latrine after entering into the house. In such circumstances also, this Court

held that when the prosecution failed to establish the intention with which he had entry inside the house, the accused cannot be convicted u/s 456,

Indian Penal Code.

6. Judging the present case on the aforesaid principles laid down by this Court, it is clear that the prosecution has failed to establish the fact that the

Petitioner was sitting on the compound wall with intention of committing theft. The question of commission of theft has been disbelieved as

discussed above. Therefore, the Court cannot surmise any other intention in this case and as such, the conviction u/s 456, Indian Penal Code

cannot sustain.

7. In the result, the revision is allowed, the conviction and sentence of the Petitioner are set aside and he is acquitted of the charge levelled against

him. His bail-bond is discharged.