Nanda Senapati and Others Vs State of Orissa

Criminal Appeal No. 128 of 1968

Court: Orissa High Court

Date of Decision: Nov. 16, 1971

Acts Referred:
Criminal Procedure Code, 1898 (CrPC) â€" Section 164, 268, 288#Penal Code, 1860 (IPC) â€" Section 147, 31, 427, 448

Citation: (1972) 38 CLT 19

Hon'ble Judges: R.N. Misra, J

Bench: Single Bench

Advocate: H. Kanungo and H.N. Kanungo, for the Appellant; Standing Counsel, for the Respondent

Judgement

R.N. Misra, J.
The Appellants, 17 in number, have all been convicted under Sections 147, 427 and 448/31 Indian Penal Code and each

of them has been sentenced to R.T. for 18 months under each of the first two counts and to R.T. for 6 months under the last count by the learned

Additional Sessions Judge, Puri with a direction that the sentence under different counts shall be concurrent and all the sentences shall run

concurrently with the sentences given in a connected sessions trial.

2. Some fishermen (locally known as Noliss) belonging to Andhra Pradesh were staying at Gundalba Sea beach within Kakatpur area of Puri

District in three different camps, namely, Gundalba, Jahaniapir and Anaksna by setting" up temporary huts. They were catching fish from the sea

and were transporting a part of their catch to Andhra Pradesh and the rest of their catch was being sold in the local area at a rate cheaper than the

prevaling rate. That had given rise to trade rivarly between the local fishermen on one hand and these Andhra fisherman on the other. On several

occasions the local fishermen had tried to drive them away. It is said that, nearabout dawn time on 22-11-1965 about 700 to 800 persons, mostly

the local fishermen, came armed with lathis and rowing sticks to Gundalba camp and demolished the huts, damaged the fishing nets, the boats and

also looted the belongings of the Andhra fishermen. Out of fear the women folk and children of the Andhra fishermen ran away to the neighbouring

villages. P.W. 1, a local fisherman, had raised a hut in the neighbour-hood mainly for buying dry fish from these Andhra Fishermen. His hut was

also damaged. The prosecution alleged that after demolishing the camp at Gundalba, the riotous mob proceeded to Jahaniapir and ransacked the

huts and looted the properties there. They did so also at the Anakaua camp.

P.W. 20 lodged a First Information Report (Ext. 8) at about 7 A.M. at the Udayapur outpost which was located a few kilometers away. The

F.I.R. (Ext. 8) was sent to the Kakatpur P.S. and the A.S.I. at the outpost proceeded to the spot. The Officers-in-charge arrived at the spot two

days after the occurrence. It is said that two more F.I.R. were lodged with the Officer-in-charge one being Ext. 1 by p.w. 1 and the other being

Ext. 6 by p.w. 17. In the first F.I.R. (Ext. 8) there was no name of any of the accused persons, but in the latter ones more particulars had been

given. The first two F.I.R. related to the incidents'' mainly at Gundalba while the third F.I.R. substantially confined its allegations to the events at

Anakana.

3. The defence was one of total denial of the prosecution case. They contended that there was already previous litigation and the relationship had

become strained. In order to harass the local fishermen this false case had been connected.

The prosecution examined 24 witnesses including the Doctor (p.w. 2), and the two Investigating Officers (p.ws. 23 and 24), but the main

witnesses who spoke about the incidents were p.ws. 1, 8, 15 and 16. P.Ws. 4, 6, 9 and 14 also spoke about a part of the occurrence. At the trial

must of the witnesses did not implicate the accused persons. Reliance was therefore, placed by the prosecution on their evidence before the

committing Court by taking action u/s 288, Code of Criminal Procedure. Statements of some of the witnesses had also been recorded u/s 164,

Code of Criminal Procedure. The learned Trial Judge did not refer to the statements u/s 164, Code of Criminal Procedure as those were not

evidence. He, however, relied on the evidence of the prosecution witnesses in the committing Court which had been admitted u/s 268, Code of

Criminal Procedure. From the discussion made by the trial Court with reference to each of the accused persons it would appear that the main

evidence came from p.ws. 8, 15 and 16 given at the commitment stage. The learned Trial Judge accepted the fabric of the prosecution case in its

essentials but found that the case had not been established as against 21 of the accused persons. While acquitting them he convicted the Appellants

in the manner already indicated. The conviction is changed in appeal.

5. The learned Standing counsel gave an analysis of the evidence to assist the at the hearing of the appeal. P.Ws. 1, 9, 14 and 15, according to the

learned Standing Counsel, are the main witnesses speaking about the occurrence. At the trial p.w. 1 stated that 700 to 800 local fishermen came to

Gundalba sea beach that morning. He was not in a position to identify any of the persons, but he had seen Appellant No. 1 Nanda Senapati and

Appellant No. 8 Babu Senapati in the crowd. He referred to Nanda as having directed demolition of the house and Babu as one of the persons

who broke the house and looted some Articles. He further said that he could recognise these two persons as they were going ahead and were very

near him. P.W. 9 stated that he could not name anyone of the members of the mob and that only about 2 or 3 persons from out of that mob were

in the dock and he identified Appellants 6 and 9 to be such persons. P.W. 14 like p.w. 1 stated that 700 to 800 persons had come to the sea

beach. They were armed. He named Appellant No. 10 and Borne other persons who are not accused in the case. P.W. 15 gave names of certain

persons whom he Law in the crowd. Of them Appellant No. 13 is the only person facing trial.

6. The learned Standing Counsel candidly stated that on the evidence at the trial it would be difficult to sustain the conviction, but since the

evidence in the committing Court after being admitted u/s 268, Code of Criminal Procedure is as good as any other, evidence such evidence must

be looked into and Since that evidence is very clear and positive there was no Scope for any interference with the conviction. The concession of

the learned Standing Counsel about the assessment of the evidence recorded at the trial stage is very fair. In fact there is no corroboration at all in

regard to the complicity of the various persons named by these witnesses. While p.w. 1 has named Appellants 1 and 8, p.w. 9 has named

Appellants 6 and 9, p.w. 14 has named Appellant No. 10, and p.w. 15 has named Appellant No. 13. Thus each of these witnesses at the trial has

referred to different persons.

7. Mr. Kanungo for the Appellants, however, seriously disputes the contention of the learned Standing Counsel that the evidence at the

commitment stage should be relied upon in this case. Mr. Kanungo concedes that such evidence can be evidence at the trial, but according to him

there has been really no compliance of the requirements of Section 288, Code of Criminal Procedure and Mr. Kanungo also contends that

evidence and the evidence at the trial cannot be held to be at par.

8. In Shranappa Mutyappa Halke Vs. State of Maharashtra, , there Lordships were dealing with the statements admitted u/s 288, Code of

Criminal Procedure. It was held that where a witness had resiled from his evidence in the committing Court and the evidence had been brought in

u/s 288, Code of Criminal Procedure, before such evidence would be accepted satisfaction about its being true and reliable was necessary. In

most cases this satisfaction can come only if there is such support in extrinsic evidence as to give a reasonable indication that not only what is said

about the occurrence in general but also what is said against the particular accused Bought to be implicated in the crime is true. If there be a case

where even without such extrinsic support the Judge of facts, after bearing in mind the intrinsic weakness of the evidence, in that two different

statements on oath have been made, is satisfied that the evidence is true and can be safely relied upon, the Judge will be failing in his duty not to do

so. It would follow that their Lordships considered the evidence in the committing Court to be a weak piece of evidence so far as the trial stage

and its intrinsic worth was doubted until it received corroboration either from extrinsic, evidence or otherwise. In Periyasamy Vs. State of Madras,

the same matter was again dealt with. Hidayatullah, J., as his Lordship then was, delivering the judgment of the Court said,

It may be stated that it is highly desirable that the Court should, before the transfer of the earlier statement to the record of the sessions case u/s

288, indicate in a brief order why the earlier deposition was being transferred to the record of the trial. This will make it quite clear to the accused

that the earlier statement is likely to be used as substitutive evidence against him. If the matter had rested with the use of the earlier statement

without this notice to the accused, we would have found it difficult to rely upon the earlier deposition.

In In Re: Burre Baluga and Others, , a Division Bench of the Andhra Pradesh High Court, said,

There is nothing in the section to hold that the Judge has to be satisfied before exercising his discretion, but there are authorities to that effect. As

the power given to him is one in deviation of the general principle that a Court can act only on the evidence given before it, the decision to let in the

previous deposition of a witness under this all should be arrived at after careful consideration. The exercise of the discretion, therefore, may imply

that the Judge has to satisfy himself as to the correctness and truth of the previous statement. It is more a rule of caution.

The same difficulty engaged the attention of their Lordships of the Supreme Court in a recent decision. In Har Prasad and Others Vs. The State of

Madhya Pradesh, , their Lordships reiterated the view in Shranappa Mutyappa Halke Vs. State of Maharashtra, . A Bench of this Court was

examining the value of evidence admitted u/s 288, Code of Criminal Procedure in State v. Rajendra Singh 1971 C.L.T. 724 : 1971 (I) C.W.R.

904. My learned brother Patra, T. in paragraph 8 of his judgment said, P.W. 8 take this opportunity to impress upon all Sessions Judges that it is

highly desirable that the Court should before the transfer of the earlier statement made by a witness in the Court of the committing Magistrate to the

record of the sessions case u/s 288, Code of Criminal Procedure, indicate in a brief order why the earlier deposition was being transferred to the

record of the trial Court. This will make it quite clear to the accused that the earlier statement is likely to be used as substantive evidence against

him. The learned Sessions Judge in this case has indicated nowhere in the order sheet that he was bringing on record u/s 288, Code of Criminal

Procedure the previous statement of p.w. 8 made in the Court of the committing Magistrate, much less has be recorded his reasons for doing so.

My learned brother Acharya, J. who added to the judgment of our learned brother delivering the main judgment stated,

The power to treat the evidence of witness duly recorded in the committing Court in the presence of the accused as substantive evidence against

him in the trial Court, as provided u/s 288, Code of Criminal Procedure is an extraordinary one and is in derogation of the general principle that a

Court can only act on the evidence given before it. That being so, the decision to utilize such a previous deposition of a witness u/s 288, Code of

Criminal Procedure should be arrived at after careful consideration, and only .when there are good and reasonable grounds for such a decision.

The power u/s 288, Code of Criminal Procedure is to be applied in the discretion of the Presiding Judge, which implies that the Presiding Judge

must apply his judicial mind to the necessity of taking the extraordinary step of exorcising the power u/s 288, Code of Criminal Procedure and the

said power cannot be used lightly and cannot be taken resource to as a matter of course, and/or in a mechanical manner.

His Lordship placed reliance on two Allahabad decisions to come to the aforesaid conclusion.

9. In this case as the order-sheet of the Sessions Case discloses there is not the minimum indication about what has been said by my learned

brother Patra, J. in his judgment 808 extracted above. There is no other material to corroborate the evidence of these witnesses in the commitment

stage in the manner indicated by their Lordships of the Supreme Court in the 1964 case. Keeping these aspects in view I think in the interest of

justice that the evidence of the committing Court of these witnesses should not be relied upon in this case.

10. I have already said that the evidence at the trial is worth nothing. Once a decision is reached that the evidence in the committing Court is not to

be utilized, the irresistible conclusion to follow would be that the prosecution has miserably failed to establish its case.

11. I would accordingly allow the appeal, set aside the convictions of each of the Appellants on various counts and direct that they be acquitted.

Their bail bonds be cancelled.