

**IN THE COURT OF THE ADDL.SESIONS JUDGE,
BHUBANESWAR**

Present:

Shri A.C.Behera, B.A.(Hons),LL.B.
Addl. Dist.& Sessions Judge,
Bhubaneswar.

Criminal Appeal No.75/07/42 of 2013/07/06

(Arising out of an order dated 31.07.2006 passed by the
learned C.J.M.,Khurda Camp at Bhubaneswar in G.R.Case
No. 3595 of 2001)

Dated this the 27th day of May, 2014

Santosh Kumar Das @
Prakash Kumar Sahu @ Pattnaik,
aged about 24 years,
S/o-Golekh Das @ Paramananda Das
Village- Kurumbankatara,
P.S.-Odagaon, Dist.-Nayagarh.

..... Appellant.

-Versus-

State of Odisha.

..... Respondent.

Counsel for the Appellant : Amicus curiae.

Counsel for the Respondent. : Sri P.K. Das Addl.P.P.

Date of Hearing :24.05.2014

Date of Judgment :27.05.2014

JUDGMENT

This is an appeal U/s.374 of the Cr.P.C., which has been preferred by the appellant against the order of conviction and sentence passed on dtd. 31.07.2006 by the learned Chief Judicial Magistrate, Khurda Camp at Bhubaneswar in G.R. Case No. 3595 of 2001, wherein the appellant was convicted with the offences U/s.457/380 and 414 r/w. Section 109 of the I.P.C. and was sentenced to undergo R.I. for five years with payment of fine of Rs.1,000/- in default to undergo R.I. for six months on each court for the offences U/s.457 & 380 of the I.P.C. and to undergo R.I. for one year and three months for the offence U/s.414 r/w. Section 109 of the I.P.C. with a direction for running of the sentences concurrently, subject to set off of the period already undergone by him as an U.T.P.

2. The appellant alongwith two others were the accused persons before the learned Court below in G.R. case No.3595 of 2001.

3. The case of the prosecution against the accused persons before the learned Court below as it called out from the impugned judgment was that, on dtd. 5/6.11.2001 night, there was theft of gold and silver ornaments from different temples i.e. from the temple of Sivakali, Kasibiswanath, Parbati and Bhandaraghara

situated within the premises of Lingaraj temple by unknown culprits. For which, F.I.R. was lodged at Lingaraj police station. Basing upon such F.I.R. Vide Ext.1, a case was registered at Lingaraj Police Station against unknown culprits and investigation was started. During investigation, the police came to know about the involvement of the appellant/accused with the same. For which, the police (I.O.) arrested the appellant first. Then basing upon the leading to discovery made by the appellant, the stolen ornaments were recovered from his associate K.Gopinarayan Chaudhury in a charged shape and forwarded him to the court. He(I.O.) also took the finger prints of the appellant for tallying with the finger prints available on the stolen Almirah and steel plate of the place of stealing and sent the finger prints of the appellant and the photographs of finger prints collected from steel Almira and steel plate for its comparison and then after completing investigation, he (I.O.) submitted charge sheet against the appellants and his two associates.

4. Accordingly the appellant alongwith his two associates were facing trial before the learned court below. While the appellant was facing trial before the learned Court below having been charged with the offences U/s. 120B/457/380 r/w. Section 414/109 of the I.P.C., his other two associates were charged with the offences U/s.120B/411/414 r/w. 109 of the I.P.C.

5. The plea of the defence was one of complete denial and false implication of the accused persons.

6. In order to substantiate the case of the prosecution against the accused persons, the prosecution examined altogether twenty five numbers of witnesses. But the defence examined none on its behalf.

7. After conclusion of trial and on perusal of the materials and evidence available in the record, the learned court below acquitted the appellant from the charge U/s.120B of the I.P.C., but held him (Appellant) guilty with the offences U/s.457/380 and 414 r/w. Section 109 of the I.P.C. and awarded sentences against him as stated above for the same vide his judgment dtd. 31.07.2006.

8. On being aggrieved with the above order of conviction and sentence passed on dtd. 31.07.2006 by the learned Court below in G.R.Case No. 3595 of 2001 against the appellant, he (appellant) has challenged the same by preferring this appeal after taking several grounds in his appeal memo.

9. I have already heard from the learned Amicus curiae for the appellant and the learned Additional P.P. for the State.

10. Basing upon the rival submissions of the learned counsels of both the side, the findings made by the learned Court below in the

impugned judgment against the appellant, the grounds taken by the appellant in his appeal memo and the plea of the defence , the crux of the appeal is :-

Whether the impugned order of conviction and sentence passed on dtd. 31.07.2006 by the learned Court below against the appellant U/s. 457/380 and 414 r/w. Section 109 of the I.P.C. in G.R.Case No. 3595 of 2001 is sustainable under law ?

11. It appears from the Para No.15 of the impugned Judgment of the learned Court below that, the learned Court below has held the appellant guilty with the offences as stated above basing upon two circumstances i.e. finger print reports as per the evidence of P.Ws. 22, 23 & 24 and the confessional statement of the appellant extending to leading to discovery of the alleged stolen ornaments in a changed shape from his associates.

12. Now it will be seen, whether there are materials in the record on behalf of the prosecution, to make the above two circumstances (on which the impugned conviction has been based) are admissible against the appellant for connecting him firmly with the above offences, in which he has been convicted.

13. So far the first incriminating circumstance against the appellant in the impugned judgment of the learned Court below by holding that, the finger prints those were available on the steel

Almirah and steel plate near the spot were the finger prints of the appellant due to tallying/matching of the same with the finger prints of the appellant taken during investigation by the investigating officer is concerned;

It is the well clarified position of law as per the provisions mentioned in Section 4, 5 & 8 of Identification of Prisoner's Act, 1920 coupled with the ratio of the decisions of the Apex Court and Hon'ble Court reported in A.I.R. 1976 (S.C.) 69 Mahood (v) State of U.P. (2012) 51 O.C.R. 791 & 2012 (3) Crimes- 642 (Madras) that, "finger prints of an accused during investigation by the police for its comparison can not be taken without the prior permission of the Magistrate and in absence of the Magistrate.

Because, it is required under law that, the finger prints of the accused during investigation can only be taken by the police only in presence of the magistrate. The main purpose and intention of that law is to eliminate the possibility of fabrication of finger print slips matching with the finger prints available at the spot.

14. Here in this case at hand, no material is found from the impugned judgment about the taking of the finger prints of the accused/appellant by the police either on the order of the Magistrate or in presence of the Magistrate. So, the provisions of law envisaged in Section 4, 5, & 8 of the Identification of Prisoners Act, 1920 have not complied with by the prosecution. Therefore, in view of the proposition of law enunciated in the

ratio of the decisions referred to supra, the evidence of P.Ws. 22, 23 & 24 and so also the finger print reports are not sufficient to implicate and connect the accused with the alleged theft. For the reasons stated above, there is no legally admissible evidence in the record to support the above alleged first circumstance relied upon by the learned Court below against the appellant. Accordingly, one of the ground of the leaned Court below to convict the appellant is found baseless.

15. So far, the second circumstance relied upon by the learned Court below to convict the appellant i.e. confession of guilt and seizure of the alleged stolen ornaments in a changed shape basing upon the alleged leading made by the appellant as per section 25 & 27 of the Evidence Act, 1872 is concerned;

16. It is the well settled propositions of law that, the evidence of the witnesses of prosecution U/s. 25 & 27 of the Evidence Act is a very weak piece. No conviction can be led basing upon the evidence of the witnesses U/s.25 & 27 of the Evidence Act i.e. confession and leading to discovery unless there is independent corroboration to the same from any independent source. On that score, the points of law has been highlighted in the following decisions.

(1974) 4 SCC-747 Jagta (V) State of Hariyana
A.I.R. 1975 (S.C.) 258 631- State of Punjab (V) Bhajan Sing & others-

CRLTRL-Extra Judicial confession is a very weak type of evidence.

(2014) 57 O.C.R. 901:-

CRLTRL- Recovery of incriminating articles made at the instance of the accused, by itself can not form the basis of conviction.

17. As stated above, when the first circumstance relied upon by the learned court below against the accused to found him guilty is held baseless and there is no corroboration to the second circumstance relied upon by the learned Court below as stated above and no conviction can be based unless there is independent corroboration to the above alleged second circumstance, then at this juncture, there is no other alternative but to hold that, the impugned order of conviction and sentence passed by the learned Court below against the appellant is not sustainable as there is no sufficient material to accept and confirm the same.

So, at this juncture, there is justification under law for making interference with the impugned order of conviction and sentence passed by the learned Court below against the appellant in this appeal filed by him (appellant). Accordingly, there is merit in the appeal of the appellant. The same must succeed. Hence ordered.

ORDER

The appeal filed by the appellant is allowed on contest. The impugned order of conviction and sentence passed on dtd. 31.07.2006 U/s. 458/380/414 r/w. Section 109 of the I.P.C. in G.R.Case No. 3595 of 2001 by the learned Court below against the appellant is hereby set aside. The appellant is acquitted from the charges/offences U/s. 457/380/414 r/w. Section 109 of the I.P.C. on the ground of benefit of doubt. The appellant is directed to be released from the jail custody forthwith unless his detention is required in any other case.

The appeal is disposed of finally.

Sent the copy of the judgment to the learned Court below.

Pronounced the judgment, in open Court this the 27th day of May, 2014 under my seal and signature.

Dictated & corrected by me

Addl.Sessions Judge,
Bhubaneswar.

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Bhubaneswar