

GAHC010160952011



In the Gauhati High Court

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

CRIMINAL APPEAL NO. 45/2011

The Union of India

Represented by the Senior Security Commissioner, N.F.

Railway, Maligaon, Ghy-11

..... **Appellant**

VERSUS

Pradip Gupta

S/O Late Jaganath Gupta, R/O Adabari Tiniali, P.S. Jalukbari,

Dist.Kamrup, Assam

..... **Respondents**

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Appellant : Ms. B. Sarma, (Amicus Curiae)

Advocate for the Respondent : Ms. D. Borpujari (Legal Aid Counsel)

Date of Hearing : **27.07.2023**

Date of Judgment : **01.12.2023**

JUDGMENT & ORDER (CAV)

1. Heard Ms. B. Sarma, learned Amicus Curiae for the appellant as well as Ms.

D. Borpujari, learned legal Aid Counsel for the respondent. The appellant is the Union of India.

2. This appeal is filed under Section 378(4) of the Code of Criminal Procedure, 1973 (Cr.P.C for short) challenging the judgment and order dated 03.1.2011 passed in CrI. Appeal No. 34(4) of 2009 passing an order of acquittal of the accused Pradip Gupta acquitting him from charges under Section 3(a) of the Railway Property (unlawful possession) Act, 1966 (RP Act for short). The respondent Pradip Gupta is hereinafter referred to as the accused.

3. The genesis of the case was that on 17.08.2002, the prosecution against the accused was initiated on the basis of a complaint lodged by Sri L.A. Singh to the effect that he received secret information of dislodgement of Railway B.G. wagon trolley lying by the side of the railway track at Langcholi Station. He immediately rushed to the spot at 16:30 hours and noticed two persons lifting cut pieces of the trolley and as soon as the miscreants noticed him and his accompanying staff, they fled. The informant L.A. Singh along with staff pursued the miscreants and apprehended Munshi Lal, who disclosed that the person, who escaped was none other than the accused. The apprehended accused was arrested and 11 pieces of material removed from the trolley were seized in connection with this case and Case No. 6/2002, under Section 3(a) RP(UP) Act

was registered and Shri J.C. Bordoloi was entrusted with the investigation and enquiry, who submitted a report against the present accused and the co-accused Munshi Lal under Section 3(a) of the RP(UP) Act.

4. During trial, the trial court could secure attendance of the present accused whereas, the case against the co-accused Munshi Lal was filed and separated and the case was split up and trial proceeded against the present accused Pradip Gupta. Evidence was recorded before charge and after hearing both the sides, a formal charge under Section 3(a) of the RP(UP) Act was framed and read over and explained to the present accused, who abjured his guilt and claimed innocence.

5. To substantiate its stance, the prosecution adduced the evidence of 9(nine) witnesses, who were cross-examined by the defence. The statement of the accused under Section 313 Cr.P.C was recorded and the tenor of his answers to the incriminating materials projected against him depict a plea of total denial. The trial Court held the accused guilty of offence under Section 3(a) RP(UP) Act and convicted and sentenced him to undergo simple imprisonment for one year.

6. The learned trial Court held that:-

“In cross examination the witness very candidly stated that without the permission of the concerned authority the auction bidder is not authorised to cut the

auction materials.

One of the vital ingredients in a case under section 3(a) RP (UP) Act, 1966 is that of reasonable suspicion of having stolen the Railway materials. In the instant case the prosecution has proved beyond all reasonable doubts that the accused Pradip Gupta was directly related in the stealing of the B trolleys as the accused managed to flee the spot as soon as he saw the RPF staffs. The prosecution case becomes much stronger on the basis of Exhibit-7 which is the statement of the other accused Munsil Lal wherein the accused had admitted that Pradip Gupta was present on the day of the incident but had managed to flee the spot. As stated earlier the contents of Exhibit-7 cannot be excluded as the RPF is empowered to record the statement of the accused and the same had to be taken into account as the RPF is not deemed Police under section 25 of the Indian Evidence Act. Therefore the admissibility of Exhibit-7 is one of the vital components in concluding that accused Pradip Gupta is involved in stealing the B.G cut trolley without lawful authority from the Railways.

2. Whether the accused had the authority from the Railways to cut the trolleys?

Without any doubt the defence failed miserably to prove that accused Pradip Gupta had any lawful authority from the Railways that he was authorised to cut the B.G trolleys at Langsuliat. A cursory peep into Exhibit-12, 13, 3(A), 3(b), 3(c), 3(d), 3(e), 3(f) shows that the Railways had given the auction to Hiten Deuri and Raju Deka through tender. The said Hiten Deuri had authorised one Kishori Das to represent him to withdraw the materials on his behalf through an affidavit on 14-05-2002. It becomes evident from Exhibit-11 that accused Pradip Gupta has stated that Kishori Das is his elder brother and he used to supervise the cutting works at Langsuliat

occasionally. The assumption can be drawn that on the day of the incident i.e., on 17-08-2002 during one of his supervisory works he had resorted to illegal cuttings more than what had been assigned and on seeing the RPF staffs he fled away from the spot.

Another inference which comes to light is that Pradip Gupta was not authorised in any way even by Kishori Das to look into the works of cutting at Langsuliat by any means and his presence itself is unauthorised. There is no material proposition proved by the defence that Pradip Gupta who was seen along with Munshi Lal was authorised to cut the B.G. trolleys at Langsuliat. It cannot be proved by the defence in any way that the Railway materials which were being cut by him had been authorised either by the auction purchaser or any of its representative.

In the absence of a concrete proof by the defence that Pradip Gupta is lawfully authorised to cut or supervise the works at Langsuliat, the prosecution case becomes reliable in concluding that the accused had committed an offence under section 3(a) RP (UP) Act, 1966. In the instant case the prosecution had proved the case against accused Pradip Gupta beyond all reasonable doubts without any probabilities.”

7. It is manifest that the trial Court relied heavily on the statement of the co-accused Munshi Lal and held the present appellant guilty of offence under Section 3(a) of the RP (UP) Act.

8. The appellate court reappraised the evidence and held that:-

“20. A cursory glance at the Ext 9 also shows that there are residential houses of several persons and forest office near the place of occurrence. In spite of there

being residence of several persons and forest office near the place of occurrence, the RPF personnel failed to call them or any one of them to be present at the time of making seizure and recording statement of accused Munshi Lal. The evidence of PW8 also makes it very clear that he directed PW4 to record statement of accused Munshi Lal in presence of Ratan Mazumdar PW7. Though the RP (UP) Act is a Special Act and over rides the provisions of Code of Criminal Procedure, yet, the prosecution has to establish its case under the said Act beyond all reasonable doubt against the accused. Since the prosecution based its case against accused Sri Pradip Gupta on the statement made by accused Munshi Lal before Sri P.N. Tiwari, the prosecution must establish by clinching and cogent evidence that Munshi Lal made statement Ext.7. But from the discussion made above it is found that the prosecution evidence has suffered from serious discrepancies and contradictions which render the evidence of witnesses and Ext. 7 doubtful.

21. Admittedly and evidently the prosecution case is found suffered from another count also i.e. for non-seizure of gas cutter machine/gas cylinder and pipe. While discussing the evidence of PW3 it is found that gas cylinder and pipe were there at the place of occurrence. Vide Ext.7 also the prosecution claimed that the trolleys were cut by using gas cutter machine and pipe. Then why the said machine or cylinder and pipe were not seized.?

22. For the entire discussion and reasons stated I am constrained to hold that the judgment and order of conviction and sentence require interference. Accordingly, the same stand set aside and accused appellant Sri Pradip Gupta is acquitted of the offence charged. He is to be set at liberty."

9. After carefully scrutinizing the decision of the learned trial Court and the decision of the appellate Court, it is held that the findings of the learned appellate Court in CrI. Appeal No. 34(4)/2009 are correct. The statement of the co-accused recorded by the Railway Police Force cannot form the basis of

conviction. The foundation of the entire case is on the basis of the statement of the co-accused. The FIR depicts that two miscreants were cutting iron pieces from the separated trolley and they could apprehend one miscreant whereas the other fled. On the admission and confession of the co-accused, the trial was initiated against the present appellant.

10. Mr. K. Yarchung, PW-2 deposed that on 17.08.2002, he was called by Sri L.A. Singh (PW-5) to accompany him to Langcholi Railway Station and on reaching the railway station, they noticed two persons cutting pieces out of the trolley. The miscreants noticed them and fled but they managed to apprehend one person namely Munshi Lal, who disclosed that the other person who escaped, was the present accused Pradip Gupta. It was alleged by Munshi Lal that Pradip Gupta asked him to cut the pieces from the trolley. Eleven pieces cut from the trolley were seized vide Exhibit-5. PW-2 also stated that he was not present when an official of the railway police, P.N. Tiwari recorded the statement of the co-accused Munshi Lal. PW-2 also mentioned in his cross-examination that Munshi Lal did not mention anything about the present accused Pradip Gupta.

11. Another constable, PW-3 Sri S.K. Singh stated that he accompanied with PW-2 and PW-5 to the railway station and they saw two persons escaping.

Those miscreants were cutting pieces out of the railway trolley. They apprehended Munshi Lal. A Gas cylinder and pipe with eleven pieces of iron materials cut out of the trolley were seized. PW-3 was also not present, when the statement of Munshi Lal was recorded by Sri L.A. Singh. The statement of the co-accused Munshi Lal was marked as Exhibit-7, who stated that under the direction of the present accused Pradip Gupta, he had cut off pieces from the railway trolley. The irony is that even this Exhibit-7 was not identified by the accused, who made the statement. This statement marked as Exhibit-7 was proved by PW-7, Ratan Mazumdar. It has been observed by the Hon'ble Supreme Court in ***Tofan Singh Vs. State of Tamil Nadu***, reported in **(2013) 16 SCC 31**, that:-

“Two other judgments of this Court, this time under the Railways Property (Unlawful Possession) Act, 1966 held that members of the Railway Protection Force could not be said to be police officers within the meaning of section 25 of the Evidence Act”

126. The golden thread running through all these decisions – some of these being decisions of five-Judge Benches which are binding upon us – beginning with Barkat Ram (supra), is that

where limited powers of investigation are given to officers primarily or predominantly for some purpose other than the prevention and detection of crime, such persons cannot be said to be police officers under Section 25 of the Evidence Act. What must be remembered is the discussion in Barkat Ram (supra) that a “police officer” does not have to be a police officer in the narrow sense of being a person who is a police officer so designated attached to a police station. The broad view has been accepted, and never dissented from, in all the aforesaid judgments, namely, that where a person who is not a police officer properly so-called is invested with all powers of investigation, which culminates in the filing of a police report, such officers can be said to be police officers within the meaning of Section 25 of the Evidence Act, as when they prevent and detect crime, they are in a position to extort confessions, and thus are able to achieve their object through a shortcut method of extracting involuntary confessions.”

12. In this instant case too, the confessions of the co-accused before the Railway Police do not prove this case against him.

13. It is thereby held that the learned trial Court has appositely held that conviction of the accused is not sustainable on the basis of the confessional statement made by co-accused.

14. The appeal is devoid of merits and does not warrant interference. Therefore this appeal is dismissed upholding the order of acquittal passed by the learned Sessions Judge, Tinsukia in CrI. Appeal. No. 34(4)/2009.

15. Send back the LCR.

JUDGE

Comparing Assistant