

GAHC010193762011



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./27/2011

UNION OF INDIA,
REP. BY N.F.RLY.

VERSUS

SUSHIL AGARWAL and 1 OTHER
SON OF LATE CHANDRA BHAN AGARWAL, RESIDENT OF MAKUM
TINSUKIA, PIN -786125, DIBRUGARH.

2:RESPONDENT NO 2
STRUCK OFF AS PER HON'BLE COURT'S ORDER DATED 27-7-11 PASSED IN
MISC CASE NO 522/11 AND ORDER DATED 3-8-11 PASSED IN CRL.L.P.1/2011

3:SRI BHRIGU SAH
SON OF LATE GUPESWAR SAH
RESIDENT OF NALIAPOOL
DIBRUGARH

For the Appellant : Mr. K.K. Parasar, CGC.

.....Advocate.

For the Respondents : Mr. R. Dubey (R-1),
Ms. D. Borpujari (R-3), Legal Aid Counsel.

.....Advocates.

Date of Hearing : 18.06.2024, 20.06.2024 & 21.06.2024

Date of Judgment : **17.07.2024**

**BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN**

JUDGMENT AND ORDER

Heard Mr. K.K. Parasar, learned Central Government Counsel (CGC) for the appellant, Union of India. Also heard Mr. R. Dubey, learned counsel for the respondent No.1 and Ms. D. Borpujari, learned legal aid counsel for the respondent No.3.

2. In this appeal, under Section 382 Cr.P.C. read with Section 378(4) of the Code of Criminal Procedure, 1973, the appellant has put to challenge the correctness of otherwise of the judgment and order dated 07.08.2010, passed by the learned Special Judicial Magistrate First Class (Railway), Tinsukia, in SR/CRNo.84/2005 [RPF/POST/TSKG(P) Case No.1(9)04, under Section 3(b) of the Railway Property (Unlawful Possession) Act, 1966]. It is to be noted here that vide impugned judgment and order dated 07.08.2010, the learned Trial Court has acquitted the respondent No.1, Sushil Agarwala and respondent No.3 Bhrigu Shah from the charge under Section 3(b) of the Railway Property (Unlawful Possession) Act, 1966.

3. The background facts, leading to filing of the present criminal appeal, are adumbrated herein below:-

“Acting on a tip off, on 13.09.2004, Shri Jayanta Das, Sub-Inspector, RPF(CIB), Tinsukia Headquarter along with other officials of RPF(CIB), Tinsukia Headquarter, and the Officer-in-Charge of Tinsukia Police Station, Shri A. Gogoi, conducted search in the scrap godown of Sushil Agarwal situated at Makum, Tinsukia and found 12 gunny bags, containing some materials lying on the

ground inside the godown and also found four persons, while dealing with the said materials, and when asked they disclosed their names as Sushil Agarwala, Dinesh Shah, Shyam Rai and Monoj Tataya. Then on checking the bags, materials belonging to railway carriage and wagon and miscellaneous fittings (aluminum) in cut pieces were found. Then on interrogation, Dinesh Shah disclosed that he had brought the materials from Dibrugarh and sold the same to the scrap damp own by Sushil Agarwala and the bags were unloaded by one Shyam Rai and Monoj Tataya, who were the workers of the scrap godown and they could not give any satisfactory reply and also could not produce any document for possession of the aforesaid materials. Then owner of the damp Sushil Agarwal managed to escape from the godown, but other persons, namely, Dinesh Shah, Shyam Rai and Monoj Tataya were taken into custody and the 12 nos. of gunny bags, containing the scrap materials were seized containing carriage and wagon fittings such as Axle box cover, widow channel, from the spot in presence of witnesses.

Thereafter, complainant Jayanta Das has lodged one complaint, upon which Case No.1 (9)04, at the RPF post Tinsukia, was registered and S.I. A. Das was endorsed to conduct enquiry. Thereafter, the Inquiry Officer had carried out the enquiry and he had examined the witnesses and also recorded the statement of accused Dinesh Shah, who confessed that his brother Bhrigu Shah was also involved in the case and he had a discussion with Sushil Agarwala regarding the purchase and selling of the railway materials and disposing of the same at the scrap godown of Sushil Agarwal. The Inquiry Officer then seized the Truck, bearing Registration No.AMZ-9288 and arrested the driver of the same, namely, Mahendra Rai and the driver also confessed that 12 nos. of gunny bags containing the railway materials were loaded in the Truck from the scrap godown of Bhrigu Shah at Naliapool, Dibrugarh and he brought the same to the scrap godown of Sushil Agarwal at Makum on 13.09.2004. Then, after

completion of enquiry, the Inquiry Officer has submitted prosecution report under Section 3(a) RP(UP) Act, 1966 against accused Dinesh Shah, Monoj Tataya, Shyam Rai and Mahendra Rai to stand trial in the Court and under Section 3(b) of the RP(UP) Act, 1966 against accused Sushil Agarwala and Bhrigu Shah. Upon the said complaint, the learned Trial Court had taken cognizance of the offence and issued process to the respondents and on their appearance and after recording evidence, the learned Trial Court has framed charge under Section 3(a) of the RP(UP) Act against Dinesh Shah and on being read and explain over the same, he pleaded not guilty to the same. The learned Trial Court had also framed charge against accused Sushil Agarwal and Bhrigu Sah under Section 3(b) of the RP(UP) Act and on being read and explain over the same to them, they pleaded not guilty and claimed to be tried.

Thereafter, during trial, the prosecution side has examined as many as 8 witnesses to bring home the charge against the present respondents and other accused persons and after closing the prosecution evidence, the learned Trial Court had examined the respondents under Section 313 Cr.P.C. and thereafter, hearing arguments of both sides, the learned Trial Court had convicted accused Dinesh Shah under Section 3(a) of the RP(UP) Act, 1966 and sentenced him to pay a fine of Rs.3,000/- with default stipulation. However, the learned Trial Court had found that the charge under Section 3(b) of the RP(UP) Act against accused Sushil Agarwala and Bhrigu Shah could not be proved beyond all reasonable doubt and therefore, extended the benefit of doubt to both of them and acquitted them accordingly."

4. Being aggrieved by the aforesaid judgment and order, the appellant has preferred this appeal on the following grounds:-

- (i) That, the learned Trial Court failed to take into consideration the correct legal proposition;

- (ii) That, the learned Trial Court had misread the evidence so brought on record;
- (iii) That, the finding of acquittal, so recorded by the learned Trial Court is perverse, being based on no evidence at all and such a finding cannot be arrived at by a reasonable person.
- (iv) That, the learned Trial Court had committed serious error in law in appreciating the evidence of the prosecution witnesses and the finding of the learned Trial Court is contrary to the law of evidence.
- (v) That, the learned Trial Court had failed to appreciate the fact that the accused had admitted their guilt during the course of enquiry and as per RP(UP) Act, 1966, RPF Officers are not being police officers, statement made before them during the course of enquiry are admissible as per Section 25 of the Evidence Act. But, the learned Trial Court had failed to appreciate the correct legal aspect and discarded the confessional statement made by the accused persons and acquitted them;
- (vi) That, the learned Trial Court convicted one of the accused leaving the other two whereas the available evidence on record clearly indicates their common intention;
- (vii) That, the learned Trial Court had failed to appreciate the confessional statement and the corroborating evidence in passing the impugned judgment;
- (viii) That, the learned Trial Court had failed to take into consideration the settled proposition of law that while considering confessional statement and after the same being proved affects other co-accused under trial for the same offence and taking into consideration under

Section 30 of the Evidence Act, the confession made by one of the many persons in the trial for the same offence is proved, the Court may take into consideration such confession as against other persons as well as the person making such confession;

- (ix) That, detection of unlawful possession of railway property by the accused is sufficient enough to sustain the conviction under Section 3 of the RP(UP) Act, 1966, and the law is well settled that there is no such necessity that there should be a report of theft of railway property and it is sufficient that if it is disclosed that the property has been reasonably suspected to have been stolen from railway, and once, it is established that the accused is in possession of the railway property, the burden is on him to establish how such possession is lawful;

5. Mr. K.K. Parasar, learned Central Government counsel for the appellant Union of India, submits that though several grounds are being canvassed in this appeal, yet, he mainly relied upon the ground Nos.(VII) and (XII) of the appeal. Mr. Parasar further submits that it is well settled in a catena of decisions that the RPF personnel are not police personnel and as held by Hon'ble Supreme Court in the case of *Balkishan A. Devidayal vs. State of Maharashtra*, reported in (1980) 4 SCC 600 and in the case of *Tofan Singh v. State of T.N.*, reported in (2021) 4 SCC 1, and as such any confessional statement made by the accused before RPF personnel are admissible in evidence. In the present case also, the respondents have made confessional statement before the complainant and the same was recorded and proved, but, the learned trial court had failed to take into account the same. Mr. Parasar further submits that the articles were recovered from the scrap godown of the respondent No.1, Shri Sushil Agarwala and the said land, where the godown is situated, belongs to the father of the respondent No.1. Mr. Parasar further submits

that the respondents, Sushil Agarwal and Bhrigu Shah were earlier convicted in case Nos.2(12)99, and 2(7)97, of the RPF Post, Tinsukia, under Section 3(a) of the RP(UP) Act, 1966. Mr. Parasar further submits that two employees of Sushil Agarwal were found in the godown along with Dinesh Sah and they were arrested, but Sushil Agarwal managed to escape and that in spite of sufficient evidence available on the record, the learned Trial Court has acquitted the respondents on flimsy grounds and there are sufficient materials to record a conviction and therefore, it is contended to allow this appeal.

6. On the other hand, Mr. Dubey, learned counsel for the respondent No.1, Shri Sushil Kumar Agarwala has supported the impugned judgment and order, so passed by the learned Trial Court. Mr. Dubey also submits that it is a fact that RPF Officers are not police officers in view of the decision of Hon'ble Supreme Court in the case of **Balkishan (supra)**. Mr. Dubey, further pointed out that though the Government has enacted RP(UP) Act, 1966, yet, no rule of the said Act was enacted. But, how to conduct enquiry into the offences under the RP (UP) Act, 1966, a procedure has been laid down, *As Enquiry into the Offences Under the Railway Property (UnLawful Possession) Act, 1966 Procedure For* and the procedure, prescribed in clause 14 and clause 22 have not been complied with by the Enquiry Officer, as no permission of Magistrate was taken while carrying out of the search and seizure. Mr. Dubey, further submits that the Enquiry Officer of RPF are not an Investigating Officer as held in Section 7 and 8 of the RP (UP) Act. Referring to a decision of Andhra Pradesh High Court in **Syed Shajahan v. State of Andhra Pradesh & Ors. [(2021) 0 Supreme (AP) 626]**, where it has been held that though a confession made before the Enquiry Officer is admissible, yet, it must be taken in presence of independent witnesses, and as the confessional statement of the accused persons, herein this case was not recorded in presence of independent witnesses, the same cannot be taken into account. Mr. Dubey further submits that the Inquiry Officer in the present case has acted like a police officer and he had not recorded the confession in

presence of two witnesses as required and as such, the statement made by the accused persons before him is hit by Section 25 of the Evidence Act and he had arrested the respondents and registered a complaint and the same is hit by Article 20(1) of the Constitution of India. And therefore, and also because of non compliance of procedure prescribed in clause 14 and 14(1) of the *Enquiry into the Offences Under the Railway Property (Unlawful Possession) Act, 1966 Procedure For*, the respondents are entitled to acquittal which the learned trial court had rightly done and therefore, it is contended to dismiss the appeal.

7. On the other hand, Ms. D. Borpujari, learned legal aid counsel for the respondent No.3, submits that the respondent No.3 is innocent and nothing was found and seized from his possession and he had only stated that his father is involved in the case. Ms. Borpujari has also adopted the submission, so advanced, by Mr. Dubey, learned counsel for the respondent No.1.

8. In reply to the submission of Mr. Dubey and Ms. Borpujari, Mr. Parasar, learned Central Government counsel for the appellant fairly submits that while conducting search, the Inquiry Officer has not obtained search warrant or permission of the Magistrate. But, while causing arrest he has followed the procedure prescribed in Section 6 of the RP(UP) Act.

9. Having heard the submission of learned Advocates of both sides, I have carefully gone through the memo of appeal and the documents placed on record and also the record of the learned trial court and also perused the impugned judgment and order, so passed by the learned Trial Court and also the case laws, referred by Mr. Parasar the learned CGC and by Mr. Dubey, learned counsel for the respondent No.1.

10. Before directing a discussion into the points referred by learned Advocates of both sides, it would be in the interest of justice to understand the power of Appellate Court while dealing with an appeal against an order of acquittal.

11. The principle, governing appeal against acquittal has succinctly been dealt with by Hon'ble Supreme Court in the case of **Chandrappa v. State of Karnataka**, reported in (2007) 4 SCC 415. In the said case Hon'ble Supreme Court has held as under:-

“42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

- (1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.*
- (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*
- (3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*
- (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*

(5) *If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.*

12. Again, in a recent case in *Mallappa & Ors vs. State of Karnataka, Criminal Appeal No. 1162 of 2011*, Hon'ble Supreme Court has held as under:-

“36. Our criminal jurisprudence is essentially based on the promise that no innocent shall be condemned as guilty. All the safeguards and the jurisprudential values of criminal law, are intended to prevent any failure of justice. The principles which come into play while deciding an appeal from acquittal could be summarized as:

- (i) Appreciation of evidence is the core element of a criminal trial and such appreciation must be comprehensive – inclusive of all evidence, oral or documentary;*
- (ii) Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge;*
- (iii) If the Court, after appreciation of evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed;*
- (iv) If the view of the Trial Court is a legally plausible view, mere possibility of a contrary view shall not justify the reversal of acquittal;*
- (v) If the appellate Court is inclined to reverse the acquittal in appeal on a re-appreciation of evidence, it must specifically address all the reasons given by the Trial Court for acquittal and must cover all the facts;*
- (vi) In a case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court.”*

13. Thus, the proposition of law, governing appeal against acquittal, which emerges

from the aforesaid two decisions of Hon'ble Supreme Court can be crystallized as under - 'an appellate court has unrestricted power to review, re-appreciate and reconsider the evidence, based on which the order of acquittal is passed and to come to its own conclusion. The presumption of innocence in favour of the accused, in case of acquittal, becomes double; firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law and secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court and in case, two reasonable conclusions are possible, on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court. The appellate court must specifically address all the reasons given by the trial court for acquittal and must cover all the facts and in case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the trial court.'

14. Keeping above principles in mind, now, an endeavour would be made to adjudge the submissions of learned Advocates of the respective parties, in the light of the given facts and circumstances on the record of the learned trial court. The record of the learned trial court indicates that to bring home the charges, under Sections 3(a) of RP (UP) Act, 1966 against accused/respondents Dinesh Shah (since deceased) and under section 3(b) of RP (UP) Act, 1966 against accused/respondents Sushil Agarwal and Bhriugu Sha, the prosecution/appellant side had examined as many as 8 witnesses, including the enquiry officer and exhibited as many as 27 documents. I have gone through the same carefully.

15. P.W.1 is Shri Joyanta Das. He is an Inspector of RPF, N.F. Railway. His evidence

reveals that on 13.09.2004, he was posted as SI/RPF/UB/Tinsukia, Head quarter. On that day, he had received an information regarding carrying of Railway materials by a Truck to the Scrap Damp of Sushil Agarwal, of Makum Road Tinsukia. Then along with Constable N. Kalita, R.G. Yadav and Rinku Kakati and S.I. Atul Gogoi of Tinsukia P.S., reached the Damp at 16.45 hrs. And arriving at there, they have found 12 numbers of bags, inside the Scrap Godown. Then, opening the bags they found Aluminum filing, C & W (carriage and wagon) fitting with window channel, a side cover, lavatory par etc. They have also found four persons who had disclosed their names as Sushil Kr. Agarwala-Damp Owner, Dinesh Shah of Dibrugarh, Shyam Rai, and Manoj Kr. Tanti, both are worker of Sushil Kr. Agarwala. While they were searching the bags, Sushil Kr. Agarwala had fled away from the spot. The four persons stated earlier that the materials were brought from Dibrugarh, by Dinesh Shah for selling the same to Sushil Kr. Agarwala. They could not produce any documents of the said articles. Then weighing the same they found the weight to be 512 kgs. Then he had seized the materials preparing seizure list, Exhibit-2. Thereafter, he brought the materials along with three persons to the RPF Post having taken into custody, and thereafter, he lodged the complaint, Exhibit-1. He also confirmed Exhibit- 3 to 12, the Card Label, hanging with bags and the signature of accused Dinesh Shah thereon. His evidence also reveals that he called nearby persons for help, but, nobody comes forward. Nothing tangible could be elicited in cross-examination of this witness. He denied the suggestions, put by the accused/respondents, that the seized article does not belong to Sushil Agarwala and that the case, against the accused/respondents, was false.

16. P.W.3, Shri Rinku Kakati, P.W.4, R. K. Yadav and P.W.6 - Shri Atul Gogoi, who had accompanied the P.W.1, also lends ample corroboration to his evidence in materials particulars. They had categorically stated about seizure of Railway Scrap material in 12 gunny bags from the scrap godown of accused Sushil Agarwal, vide seizure list,

Exhibit 2, and also confirmed Exhibit- 3 to 12, the Card Labels, hanging with the seized bags. The evidence of P.W. 3 and 4 also reveals that Sushil Kr. Agarwalla had fled away from the Godown. However, the evidence of P.W.6 reveals that he had forgotten if the owner of the godown was present or not. Probative value of their evidence could not be demolished in cross-examination.

17. P.W.2, Shri Chandan Das is JF-I/C & W/ Tinsukia, N.F. Railway. His evidence reveals that on 23.09.2004, as per requisition, he had attended RPF/POST/Tinsukia and on production of 12 numbers of Gunny bags by S/I Ashok Das, he had examined the materials inside the bags and confirmed that the materials to be of Railway, exclusively used in coaching stock only. He confirmed Exhibit- 3 to 12, the Card Labels hanging with the seized bags. Probative values of the evidence of this witness also could not be demolished in cross-examination.

18. P.W.5, Mrs. Panchi Borah Dohotia was a ward Commissioner of Ward No. 19 of Dibrugarh. Her evidence reveals that she had issued one residential proof Certificate, Exhibit-23, in respect Bhrigu Shah, who deals with scrape material and resides in her ward.

19. P.W.7, Shri Niranjana Baruah was a Circle Officer of Tinsukia Circle. His evidence reveals that he had issued one Certificate, Exhibit-24, as asked by Enquiry Officer of the Railway, to the effect that a plot of land measuring 1 Bigha 2 Katha 14 lechas in dag No. 952 and 996, PP -299 of Tinsukia Town Street No.26, stands in the name of Ram Room Mahatoo, Asabal Lal Mahatoo, Mohonlal Mahatoo all are son of Late Jugeswar Mahatoo and also in the name of Chandra Bhan Agarwala.

20. P.W. 8 is Shri Ashok Das, Inspector/RPF/CIB/Guwahati. His evidence reveals that

on 13.09.2004, he was entrusted to enquire the case No. 1(9) 04, u/s 3(a) RP(UP) Act by S.I. Niren Saikia. He then recorded statement of Dinesh Shah, and thereafter, on 14.09.2004, he recorded the statement of Shyam Rai and Manoj Kumar Tataya. Thereafter, he had visited the place of occurrence, examined the witnesses, prepared Sketch Map, Exhibit-25 and seized one Truck, bearing registration No. AMZ-9288, which brought the materials on 18.09.2004, and arrested driver Mahendra Rai and Bhrigu Shah had surrendered at the RPF Post. He had also collected one Certificate regarding scrap dump of accused Bhrigu Shah from the Ward Commissioner, Dibrugarh and also collected one Certificate regarding the scrap dump of accused Sushil Kumar Agarwala, from the Circle Officer, Tinsukia. Thereafter, he had arrested accused Sushil Kumar Agarwala on 28.09.2004, and recorded his statement, wherein he confessed his guilt. Then he obtained a Certificate from Chandan Das in respect of examination of the scrap materials and also recorded his statement. Thereafter, he obtained and seized original certificate of registration of SP Engineering Works which is attached with scrap dump at Makum. His evidence also reveals that accused Sushil Kumar Agarwala and Bhrigu Shah were previously convicted u/s 3(a) RP (UP) Act. Thereafter, he had submitted prosecution report, Exhibit-27, against accused Sushil Kumar Agarwala and Bhigru Shah and other accused persons u/s 3(b) RP (UP) Act. He confirmed statement of accused Bhrigu Shah, Exhibit-22, the statement of accused Dinesh Shah, Exhibit-21, and the statement of accused Sushil Kumar Agarwala, Exhibit-19, and the complaint, Exhibit-1, and the expert report, Exhibit-26.

21. It is elicited in cross-examination of this witness that in the Certificate given by Circle Officer, Tinsukia the name of Sushil Kumar Agarwala was not mentioned. It is also elicited that except RPF personnel and police personnel, no independent witnesses were present while conducting search and seizure. He denied the suggestions, put by the respondents that Sushil Kumar Agarwala was not present at the scrap dump on the day of conducting search. It is also elicited that during

recording of statement of accused Dinesh Shah, Manoj Tataya and Shyam Rai on 14.09.2004, no independent witnesses were present.

22. It is to be noted here that accused Sushil Kumar Agarwala also examined himself as D.W.1, wherein he deposed that he had no scrap godown at Makum Road and that Shyam Rai and Monoj Tatya were not his worker and that on 13.09.2004, he was not present at the scrap godown and he had never fled away seeing the RPF personnel and that on that day he went Dibrugarh for chekup of his health. He also deposed that he was disowned by his father, by making a declaration to that effect in News Papers and that he had no relation with the scrap godown, but, he heard that a raid was conducted in the godown of his father, and he along with his Advocate, had surrendered at the RPF post, having come to know that he was being searched by RPF personnel and he was released from there on bail. He did not know Dinesh Shah and Bhrigu Shah. His signature was taken on a blank paper forcefully and he denied Exhibit-19 being his statement and that he was falsely implicated by Joyanta Das and Ashok Das. It is elicited in his cross-examination that he was disowned in the year 2003 and that on 13.09.2004 he returned home after check-up at around 8.00 pm at Dibrugarh. He denied the suggestion that he resides in his own house and the godown belongs to him.

23. It is to be noted here that the learned trial court had, on the basis of above evidence discussed herein above, had held that the evidence of P.W.6, Shri Atul Gogoi reveals that he had not remembered if accused Sushil Kumar Agarwal was present at the scrap godown or not on the date of conducting search, and being a neutral witness, his evidence makes the evidence of the other prosecution witnesses doubtful. The learned trial court also held that on the relevant date i.e. 13.09.2004, he was at Dibrugarh for his health checkup and in the year 2004, he was not the owner of the

scrap godown and that he was disown by his father and produced the report of the News Papers, in support of the same and that the evidence of P.W.7, the Circle Officer, Tinsukia and Exhibit-24 indicates that one part of the land stands in the name of Chandra Bhan Agarwala and on such count accused Sushil Kumar Agarwala was neither present at the scrap godown nor he was the owner of the Godown.

24. The learned trial court also held that accused Bhrigu Shah was prosecuted on the basis of confessional statement of co-accused Sushil Kumar Agarwala, Dinesh Shah and Mahendra Rai and that it is well settled that solely on the basis of confessional statement of co-accused a person cannot be prosecuted. Thereafter, the learned trial court has acquitted accused Sushil Kumar Agarwala and Bhrigu Shah on benefit of doubt. However, the learned trial court had found that the seized scrap material of railway were recovered from the possession of accused Dinesh Shah and thereafter convicted him under section 3(a) of the RP(UP) Act and sentenced him to pay a fine of Rs. 3,000/ in default simple imprisonment for six months.

25. It is to be noted here that Section 3 in The Railway Property (Unlawful Possession) Act, 1966 read as under:-

3. [Penalty for theft, dishonest misappropriation or unlawful possession of railway property.] *[Marginal heading "Penalty for unlawful possession of railway property" substituted by Act No 25 of 2012.]*

[Whoever commits theft, or dishonestly misappropriates or is found, or is proved] [Substituted for the words "Whoever is found, or is proved" by Act No. 25 of 2012.], or is proved to have been, in possession of any railway property reasonably suspected of having been stolen or unlawfully obtained shall, unless he proves that the railway property came into his possession lawfully, be punishable:-

- (a) for the first offence, with imprisonment for a term which may extend to five years, or with fine, or with both and in the absence of special and adequate reasons to be mentioned in the judgment of the Court, such imprisonment shall not be less than one year and such fine shall not be less than one thousand rupees;
- (b) for the second or a subsequent offence, with imprisonment for a term which may extend to five years and also with fine and in the absence of special and adequate reasons to be mentioned in the judgment of the Court, such imprisonment shall not be less than two years and such fine shall not be less than two thousand rupees.[Explanation.- For the purposes of this section, "theft" and "dishonest misappropriation" shall have the same meanings as assigned to them respectively in section 378 and section 403 of the Indian Penal Code.] *[Explanation inserted by Act No. 25 of 2012.]*

26. The accused/respondents were charged under section 3(b) RP(UP) Act, as the offence they had committed was a subsequent offence. A cursory perusal of the section indicates that it makes a person liable when he commits theft, or dishonestly misappropriates or is found, or is proved, or is proved to have been, in possession of any railway property, reasonably suspected of having been stolen or unlawfully obtained, unless he proves that the railway property came into his possession lawfully.

27. Now, advertent to the facts and circumstances on the record and also having examined the finding, so recorded by the learned trial court in respect of accused Sushil Kumar Agarwala and Bhriugu Shah in the light of the facts and circumstances on the record and also in the light of submissions of learned Advocates of both sides, the finding of the learned trial court, appears to be not irrational or unjustified.

28. Indisputably, nothing has been found and seized from the possession of accused/respondent No.3, Shri Bhrigu Shah. Ms. Borpujari, the learned Legal Aid Counsel has rightly pointed this out during her argument. As stated above, the section makes liable a person when he commits theft, or dishonestly misappropriates or is found, or is proved, or is proved to have been, in possession of any railway property, reasonably suspected of having been stolen or unlawfully obtained.

29. Though, Mr. Parasar, the learned CGC submits that the respondents had allegedly made a confessional statement before the enquiry officer, which is admissible in evidence as the enquiry officer is not a police officer, as held by Hon'ble Supreme Court in the case of **Balkishan A. Devidayal (supra)**, and **Tofan Singh (supra)** yet, this court is unable to agree with Mr. Parasar in view of the facts that the same was not recorded in presence of independent witnesses. Same is the position in respect of accused Sushil Kumar Agarwala whose confessional statement also recorded in absence of independent witnesses as mandated by *Enquiry into the Offences Under the Railway Property (Unlawful Possession) Act, 1966 Procedure For.*

30. That being so, there is substance in the submission of Mr. Dubey, the learned counsel for the respondent No.1 who has rightly pointed this Court during argument, and the decision of Andhra Pradesh High Court in **Syed Shajahan (supra)** also fortified his submission. Notably, in the said case it has been held that though a confession made before the Inquiry Officer is admissible, yet, it must be taken in presence of independent witnesses and as the confessional statement made here in this case was not recorded in presence of independent witnesses, the same cannot be taken into account.

31. It also appears that barring his own confessional statement and also barring the

confessional statement of co-accused Sushil Kumar Agarwala, Dinesh Shah and Mahendra Rai, there is no other incriminating material against accused Bhrigu Shah. It is well settled that confessional statement of co-accused could not be used against other co-accused. Section 30 of the Evidence Act clarifies that confession of one accused is not considered as substantive piece of evidence against a co-accused. However, it allows the court to consider such a confession along with other evidence in the case. In the case in hand there are no other materials. Therefore, this court is inclined to record concurrence with the submission of Ms. Borpujari, the learned legal aid counsel.

32. Further, the evidence of P.W.7 and the Certificate issued by him- Exhibit-24, indicates that one part of the land stands in the name of Chandra Bhan Agarwala not in the name of the accused/respondent No.1-Sushil Kumar Agarwala. Mr. Dubey, the learned counsel for the accused/respondent No.1 has rightly pointed this out during his argument and I find substance in the same. Indisputably, also he was disowned by his father by way of paper publication. Moreover, the evidence of P.W.6, Shri Atul Gogoi, who appears to be an impartial witness, having not been RPF personal, had not supported the evidence of other witnesses, who had deposed in presence of accused Sushil Kumar Agarwala at the time of conducting raid in his scrap godown. Notably, P.W.6 stated that he had not remembered if accused Sushil Kumar Agarwal was present at the scrap godown or not. Thus, the finding, so recorded, by the learned trial court, in respect of accused/respondent No.2 also cannot be said to have suffered any infirmity or impropriety.

33. Further, it appears from the record that while conducting search in the scrap godown of the accused/respondent No.1, the P.W.1 had not obtained permission or search warrant from the Magistrate as required by section 10 of the said Act and

Clause 22(1) of the *Enquiry into Offences under the Railway Property (Unlawful Possession) Act, 1966, Procedure For*, as the P.W. 1 is not a police officer. Notably, Section 10 of the RP (UP) Act provides for issue of search warrant. It provides that:-

If an officer of the Force has reason to believe that any place is used for the deposit or sale of railway property which had been stolen or unlawfully obtained, he shall make an application to the Magistrate, having jurisdiction over the area in which that place is situate, for issue of a search warrant.

● *The Magistrate to whom an application is made under sub-section (1), may, after such inquiry as he thinks necessary, by his warrant authorize any officer of the Force-*

- *to enter, with such assistance as may be required, such place;*
- *to search the same in the manner specified in the warrant;*
- *to take possession of any railway property therein found which he reasonably suspects to be stolen or unlawfully obtained; and*
- *to convey such railway property before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety.*

34. Admittedly, herein this case P.W.1 had not obtained search warrant from the Magistrate. Mr. Parasar, the learned CGC, has fairly conceded to the submission of Mr. Dubey, the learned counsel for the accused/respondent No.2. Moreover, as required by Clause 22(2) of the *Enquiry into Offences under the Railway Property (Unlawful Possession) Act, 1966, Procedure For*, the search was not

conducted in presence of two independent witnesses. Though, P.W.1 stated that before search he call for help from nearby persons, but, no one come forward, yet, he could not named those persons when asked in cross-examination by the accused/respondents.

35. In view of the search and seizure being made by the P.W.1 in contravention of the relevant provision of law and procedures, this court is of the view that the impugned judgment and order of acquittal of the accused/respondents, so passed by the learned trial court, warrants no interference of this court. There appears to be no other substantial and compelling reason to interfere with the impugned judgment and order dated 07.08.2010, so passed by the learned Special Railway Magistrate, Tinsukia. With their acquittal, by the learned trial court, the presumption of innocence of the accused/respondents becomes double as at the first instance, the presumption of innocence is available to them under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Next, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court as held by Hon'ble Supreme Court in the case of *Chandrappa (supra)*.

36. In the result, I find this appeal devoid of merit, and accordingly, the same stands **dismissed**. Send down the record of the learned trial court with a copy of this judgment and order. The parties have to bear their own cost.

37. Before parting with the record this court is inclined to place on record its deep appreciation to Ms. D. Borpujari, learned legal aid counsel, appearing for the respondent No.3, for her invaluable assistance to this court in disposing of the present appeal. The Registry shall pay her fees, as per her entitlement, in accordance with

relevant Rules.

JUDGE

Comparing Assistant