

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.395 OF 1998

The State of Maharashtra,
(At the instance of Railway
Protection Force, Railway
Station, Nasik Road) ... **Appellant**
V/s.

Nizamuddin Kutubuddin Ansari
Age.48, Occupation Business
R/o.Mumtaz Park, Flat No.5,
Nasik ... **Respondent**

.....
Mrs.M.R.Tidke, APP for the Appellant.
Ms.Vrishali Raje i/b. Mr.P.N.Joshi, Advocate for the Respondent.
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CORAM : ABHAY M. THIPSAY J.

DATED : 20TH AUGUST 2015

ORAL JUDGMENT :

1. The respondent, along with four others, was prosecuted on the allegation of having committed an offence punishable under section 3(a) of the Railway Property (Unlawful Possession) Act, 1966 (hereinafter referred to as “the RPUP Act”) on the basis of a complaint lodged by one B.S.Kardan – Sub-Inspector in the Railway Protection Force. The other accused pleaded guilty to the charge that was framed after recording evidence and were

convicted and sentenced on the basis of their plea of guilty. The present respondent, who was the accused No.2 in the said case, pleaded not guilty, and, as such, was tried by the Judicial Magistrate First Class (Railways), Manmad. The Magistrate, after holding a trial, found him guilty and sentenced him to suffer Simple Imprisonment till rising of the Court and to pay a fine of Rs.5,000/-, in default to suffer Rigorous Imprisonment for one year.

2. The respondent appealed to the Court of Sessions from the Judgment and order of his conviction and sentence imposed upon him. The learned Additional Sessions Judge, Nashik, who heard the appeal, set aside the Judgment and Order delivered by the Magistrate, and acquitted the respondent.

3. Being aggrieved by the said order of acquittal, passed by the Additional Sessions Judge, Nashik in appeal, not the complainant, but the State of Maharashtra has filed the present appeal challenging the order of acquittal and praying that the respondent be convicted.

4. The maintainability of this appeal was doubted by reason of it having been filed by the State of Maharashtra instead of the Inspector of the Railway Protection Force, or the Central Government, and, therefore, the Additional Public Prosecutor was

asked to satisfy this Court about it. The Additional Public Prosecutor has not been able to satisfy me that the present appeal, filed by the 'State of Maharashtra' against the acquittal, is maintainable.

5. There are two aspects that lead to the doubt about the maintainability of this appeal. The case against the respondent arose on the basis of a complaint filed by a Sub-Inspector of the Railway Protection Force. The Railway Protection Force is empowered to investigate/inquire into the offences punishable under the RPUP Act. Sub-Section (2) of Section 378 of the Code of Criminal Procedure, which deals with 'appeal in case of acquittal', leaves no manner of doubt and when an order of acquittal is passed in a case in which the offence has been investigated into by an Agency empowered to make investigation into such offence under any Central Act other than the Code, then it would be Central Government, who can direct the Public Prosecutor to present an appeal against such an order of acquittal. Thus, if the appeal is held to be filed on the basis of Sub-Section(2) of Section 378 of the Code, then it would be the Central Government who can direct filing of such an appeal. In the instant case, admittedly, the appeal has been filed by the Public Prosecutor not on the direction of the 'Central Government', but on the direction of the 'State of Maharashtra'.

6. The second factor creating a doubt about the maintainability of the present appeal is the provisions of Sub-Section (4) of Section 378 of the Code, which deals with an order of acquittal in a case instituted upon a complaint. The present case was instituted on the complaint filed by B.S.Kardan Sub-Inspector of Railway Protection Force. It was being tried as per the procedure for trial of warrant cases instituted otherwise than on a police report and, therefore, that it was a case 'instituted upon complaint' cannot be doubted at all. Sub-Section (3) of Section 378 provides that in such a case, the complainant can, with the special leave of this Court, file an appeal from the order of acquittal. In this case, the complainant i.e. B.S.Kardan, or his representative i.e. any other member of the Railway Protection Force has not come forward for filing the present appeal. The appeal, as aforesaid, has been filed by the State of Maharashtra, which is not in accordance with the scheme of the provisions of Section 378 of the Code.

7. After carefully considering the matter, I am of the opinion that irrespective of whether the provisions of Sub-Section (2) or of Sub-Section (4) of Section 378 would apply to this case, and in either case, the State of Maharashtra was not entitled to file an appeal against the acquittal in this case. This is more so, when neither the original complainant nor the Central Government have

been joined as party-respondent to the present appeal. The appeal, as filed, is, therefore, not maintainable.

8. However, since the appeal had been admitted as the relevant provisions had not been pointed out to the Court at the time of admission, I have considered the appeal also on merits. I have heard Mrs.M.R.Tidke, the learned Additional Public Prosecutor for the Appellant. I have heard Ms.Vrishali Raje, the learned counsel for the Respondent.

9. The case of the complainant was that the complainant - B.S.Kardan, Sub-Inspector of the Railway Protection Force received secret information that railway wooden sleepers had been brought to Kachh Wooden Saw Mill, Nashik. Kardan then along with staff went to the Saw Mill and found that the railway wooden sleepers were being cut. Kardan called two panchas and made enquiry with the owner of the Saw Mill i.e. accused No.1 – Shivajibhai Patel, who was unable to show any receipt in respect of the possession of the said sleepers. There were 39 wooden sleepers having some marks indicating the same to be 'railway property'. The accused No.1 Shivajibhai disclosed that he had purchased the said sleepers at the rate of Rs.60/- per sleeper from Nizamuddin (accused No.2) - the respondent herein - who had brought the same in a truck at about 9.00 a.m. on that day. The case is that the respondent was to come to the Saw Mill to receive the payment from the accused No.1 and when he came, he was

also apprehended. Based on the statements made by the accused persons, three others were also arrested and prosecuted.

10. The respondent was not found to be in unlawful possession of the property said to be 'railway property'. He was not seen by any witness at any time in possession of the said property. He came to be implicated on the basis of the statement allegedly made by the accused No.1. The evidence against the respondent consisted only of his own confessional statement, and the confessional statements of the co-accused said to have been recorded by Sub-Inspector Kardan, After going through the record of the case and the Judgment delivered by the Magistrate, as also by the Additional Sessions Judge, with the assistance of the learned counsel for the respondent, it is clear that except the confessional statements, there was no other evidence against the respondent.

11. The learned Magistrate had believed the confession of the respondent and had based his conviction thereon. The learned Additional Sessions Judge, however, was of the view that the confessional statement of the respondent recorded by Sub-Inspector Kardan could not be safely relied on. The Additional Sessions Judge referred to the evidence of panch Pandurang Kale (PW6), according to whom, the confessional statement of the respondent (Exh.15) was not recorded by Sub-Inspector Kardan at all. This witness had indeed stated in his evidence that Sub-

Inspector Kardan was not present, when the same was being recorded. Based on the doubt, which arose from the evidence of this witness, the learned Additional Sessions Judge reversed the Order of conviction and acquitted the respondent.

12. I have carefully considered the matter.

13. That, an officer from Railway Protection Force not being police officer, the confessional statement made by a person before such officer would not be hit by the provisions of Section 25 of the Evidence Act cannot be doubted. As such, it can be received in evidence. Before receiving such a confession in evidence, it should, however, appear to the Court that the confession is not caused by any inducement, threat or promise, as has been referred to in Section 24 of the Evidence Act. Section 24 of the Evidence Act lays down that a confession made by an accused person is *irrelevant* in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. The word, 'appears' used in this Section is significant. The appropriate meaning of the word 'appears' is 'seems'. It

imports a lesser degree of satisfaction than required for 'proof'. It is well settled that it would be for the prosecution to affirmatively establish that the confession on which reliance is being placed had not been caused by inducement, threats or promise. A positive rule of criminal law is that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear or hope of advantage exercised or held out by a person in authority. Though the officers from the Railway Protection Force are held not to be 'police officers', still, they do have powers to arrest and detain a person, on the accusation of such person having committed an offence punishable under the provisions of R.P.U.P. Act. Therefore, the voluntariness of a confession made before such an officer, would need to be ascertained before the same is received in evidence and acted upon by a Court of Law.

14. I have examined the confessional statement of the respondent (Exh.15). I do not find that any of the usual precautions to ensure the voluntary nature of the confession were taken by the officer recording confession of the respondent. The respondent was not asked *why* he was making the confession, the reply to which would have gone a long way in ascertaining the voluntariness or otherwise of the confession. I do not find that it was explained to the respondent that he was not bound to make

confession and that if he would make one, the same may be used as evidence against him. Neither the record of the confessional statement (Exh.15), nor the evidence of Sub-Inspector – Kardan shows that any such warning was given to the respondent.

15. It is not the policy of the law to encourage proof of the guilt of a person solely by his own confessional statement. In this case, except his own confessional statement and that of the co-accused, there was no other evidence against the respondent.

16. It also needs to be noted that, in spite of the fact that the RPUP Act provides for a minimum sentence, all the accused persons, who pleaded guilty, were dealt with leniently by awarding a sentence only of *Simple Imprisonment till the rising of the Court* and of fine. Considering this, along with other relevant aspects, the confessions having been caused by any inducement, or promise, cannot be ruled out.

17. In any case, the doubt felt by the Additional Sessions Judge, '*whether the statement which was said to have been made by the respondent was indeed and in fact made by him*', cannot be said to be unreasonable, in view of the testimony of Pandurang Kale (PW6). No evidence to corroborate the facts appearing in the confessional statements was collected; and, at any rate, no such evidence was produced during the trial.

18. When such was the position, and when except the confessional statements of co-accused, which were also recorded without taking precautions to ensure the voluntariness thereof and without administering any caution to them, there was no other material against the respondent, the order of the acquittal passed by the learned Additional Sessions Judge cannot be said to be suffering from any error or illegality.

19. The view of the matter as taken by the learned Additional Sessions Judge – in any case – is, a *possible view*. No interference with the impugned Judgment and Order is, therefore, warranted.

20. The appeal is dismissed.

(ABHAY M. THIPSAY J.)