

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Crl.A.No.1430 of 2014

JUDGMENT:

This Criminal Appeal is filed challenging the judgment

dt.10-09-2007 in C.C.No.18 of 2006 of the II Metropolitan Magistrate for Railways, Visakhapatnam, acquitting the respondent/accused for having committed the offence under Section 3 (a) of Railway Property (Unlawful Property) Act, 1966.

2. The case of the prosecution is that on 04-10-2004 in the early hours at 3.15 a.m., an ambush watch was conducted by the Assistant Sub Inspector of the Railway Police Force/complainant and other officials at R & D yard area within the Port area, Visakhapatnam. They intercepted one auto trolley coming from the R & D yard side in a suspicious manner. On checking the auto trolley, they found two persons standing in the trolley and two persons were seated in the driver seat. On verification of the trolley, they found railway property. On demand, all the four accused failed to produce any receipt or authority for possession of the railway property and confessed their guilt. A-1 stated that he is the driver cum owner of the auto trolley and the others were outsiders and his associates; that they entered into the yard, stole railway property and were going to sell to A-5, who is a scrap receiver at Kancharapalem. They were

apprehended by the RPF officials on the road near Pydithallamma temple. Since the property was reasonably suspected to have been stolen or unlawfully obtained from the Railways, the property was seized under the cover of seizure list and statements of A-1 to A-4 were recorded on the spot. A-1 to A-4 were brought to the RPF Post, Marripalem and a Crime No.44 of 2006 was registered. It is alleged by the prosecution that on 06-10-2004 at 16.00 hours reliable information was received that there was stolen railway property in the scrap hut of A-5 situated at Kancharapalem. So the complainant along with other officials and staff proceeded to the spot. On going to the scrap hut, they found two persons dealing with iron scrap inside the hut. On seeing the RPF party, A-6 tried to escape from the hut but the other person gave his identity particulars. A-5 stated that he is the owner of the iron scrap hut and that he and A-6 were running the scrap iron shop. In the presence of A-5, the search of hut was conducted and railway property was recovered. A-5 did not produce receipt or authority for the lawful possession of the railway property. A-5 confessed that he and A-6 were running the scrap shop by purchasing stolen property from A-1 to A-4. On 18-10-2004, A-6 was arrested. He also confessed his guilt. On 28-10-2004 P.W.9 attended the RPF Post Marripalem and examined the property and certified that the material seized was used in railway wagons belonging to Indian Railways and not available in open market for sale. Therefore, the

accused were charged for committing an offence under Section 3 (a) of the above Act.

3. The accused pleaded not guilty and claimed to be tried.

4. During the trial, the complainant examined P.Ws.1 to 10 and marked Exs.P-1 to P-20 and MOs.1 to 5 in support of their case.

5. After completion of the complainant's evidence, all the accused were examined under Section 313 Cr.P.C. and they denied their guilt.

6. On consideration of the evidence on record, the Court below acquitted the accused.

7. Questioning the same, this Criminal Appeal is filed.

8. The learned Public Prosecutor contended that coil springs and brake blocks (M.Os.1, 2, 4 and 5) were seized from the auto trolley (M.O.3) in which A-1 to A-4 were traveling on 04-10-2004; P.W.9 has certified that this property is only used in railway wagons belonging to Indian Railways and not available in open market for sale; and since no valid explanation had been given by the accused explaining the possession of the said property, they ought to have been convicted by the Court below. He also contended that A-5 and A-6 were also guilty of receiving stolen

property since in the raid on scrap shop of A-5 on 06-10-2004, they said that they were habituated to receive stolen railway material in the scrap hut and selling it.

9. It is not disputed that the items mentioned supra which have been recovered from possession of A-1 to A-4 on 04-10-2004 did not bear any markings of Railways. No theft report from any concern of the Railways was given by any officials of railways as admitted by P.W.9. No stock register was also produced by the prosecution showing that the above M.Os. were removed out of the stock of the Railways. In order to make out an offence under Section 3 (a) of the said Act, the prosecution has to show that what was seized from the accused is Railway property. Except the oral evidence of P.W.9 and the certificate given by him, there is nothing to show that the seized material belonged to the Railways. Such evidence of P.W.9 cannot be accepted at face value in the absence of corroborating evidence in the form of stock register or a theft report particularly when there are no markings on the property. Moreover, it is not disputed that the seizure of the above material from A-1 to A-4 was made in an R & D yard which is part of the Port area in Waltair and is not within the precincts of railways. The procedure for making search by officers of a police station in an area outside their jurisdiction is provided for in Section 166 Cr.P.C. It states:

“Section 166 - When officer in charge of

police station may require another to issue search-warrant:

(1) An officer in charge of a police station or a police officer not being below the rank of sub-Inspector making an investigation may require an officer in charge of another police station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made, within the limits of his own station.

(2) Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

(3) Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police station to cause a search to be made under sub-section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police station or a police officer making any investigation under this Chapter to search, or cause to be searched, any place in the limits of another police station in accordance with the provisions of section 165, as if such place were within the limits of his own police station.

(4) Any officer conducting a search under sub-section (3) shall forthwith send notice of the search to the officer in charge of the police station within the limits of which such place is situate, and shall also send with such notice a copy of the list (ianfy) prepared under section 100, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in sub-sections (1) and (3) of section 165.

(5) The owner or occupier of the place searched shall, on application, be furnished free of cost with a copy of any record sent to the Magistrate under

sub-section (4).”

10. There is nothing to show that the procedure prescribed in Section 166 (4) Cr.P.C. was followed by the RPF officials while making recovery of M.Os.1, 2, 4 and 5 from A-1 to

A-4. In the absence of compliance with this provision of law, I am of the opinion that the search itself cannot be said to be validly made in law and material seized in such a search cannot be used by the prosecution since there is every possibility of the RPF officials planting such material on A-1 to A-4.

11. Therefore, I am of the opinion that the Court below has rightly acquitted A-1 to A-4. More so, when no independent mediators were there at the time of seizure of M.Os.1, 2, 4 and 5.

12. Coming to A-5 and A-6, the search in the premises occupied by A-5 was admittedly done two days later. Under Section 100 (4) of the said Act, there should be two independent mediators so as to show that the search is a free and fair search. Admittedly there is only one of the mediator P.W.7 who also turned hostile.

13. Admittedly no property is recovered from the possession of A-6 and no material was placed by the prosecution before the Court to establish that A-5 was doing scrap business in the premises where the raid was made on 06-10-2004. If the police had suspected that

there was stolen material in the premises of A-5, nothing prevented them from obtaining a search warrant since there was a two day gap between the day of the original seizure and the search of the premises of A-5. This creates a doubt whether the search was conducted in the shop of A-5 at all.

14. In this view of the matter, I do not find any merit in the Criminal Appeal and the same is accordingly dismissed.

15. As a sequel, miscellaneous petitions pending, if any, shall stand disposed of.

JUSTICE M.S.RAMACHANDRA RAO

Date: 04.02.2015

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