

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

CRIMINAL APPEAL No.1158 of 2014

JUDGMENT:

This appeal is preferred by the State challenging the judgment dt.27-03-2008 in C.C.No.3 of 2006 of the II Metropolitan Magistrate for Railways, Visakhapatnam acquitting the respondents of having committed offence under Section 3(a) of Railway Property (Unlawful possession) Act, 1966 (for short 'the Act').

2. Heard the learned Public Prosecutor for the State and Sri V.V.N.Narasimham, learned counsel for respondents.

3. The case of the appellant was that on 10-08-2004 at 15.30 hours a raid/search was conducted by the Asst. Sub-Inspector of Police along with Sub-Inspector of Police and staff under the supervision of the Post Commander, R.P.F., Visakhapatnam and Post Commander, RPF Marrisipalem in the scrap godown of the 1st respondent situated at Mindi road, Gajuwaka after getting credible information with regard to concealing of stolen railway material; as there was no time to obtain search warrant and to avoid possibility of shifting the stolen railway property from the godown, search was conducted without warrant in the presence of L.W.4. The

raid party recovered railway material of CST-9 plates broken pieces of different sizes. The 1st respondent failed to produce any authority and stated that he is doing iron scrap business since long time and also purchased auctioned materials and that he used to purchase stolen railway material also from unknown ferriwalas. As the property was suspected to be stolen or unlawfully obtained from Railways, as per the instructions of Post Commander, R.P.F. Marripalem, the A.S.I. seized the said properties, arrested A-1 and registered case No.39 of 2004. The premises where the goods were found was discovered to be owned by 2nd respondent/A-2. Another raid was conducted on 21-12-2004 on the same scrap shop in which A-2 was present at that time and according to the prosecution, he admitted his guilt with regard to possession of railway material. He was also added as an accused in case Cr.No.39 of 2004.

4. Charge was framed against accused in C.C.No.3 of 2006 that they are guilty of having committed offence under Section 3(a) of the Act. The accused pleaded not guilty and claimed to be tried. The prosecution examined P.Ws.1 to 6 and marked Exs.P-1 to 11 and M.Os.1 to 30. The defence examined D.Ws.1 and 2.

5. By judgment dt.27-03-2008, the Court below

acquitted the accused on the following grounds: (a) that the procedure contemplated under Section 100 of the Code of Criminal Procedure (for short 'the Code') was not followed by RPF while conducting search and seizure; (b) although the prosecution claimed that the search was conducted in the presence of L.W.4, he was not examined and such non-examination is fatal; (c) RPF has conducted search outside the jurisdiction of railways and therefore they should have followed the procedure prescribed in Sections 165 and 166 of the Code for conducting searches outside their jurisdiction, and in the present case no steps have been taken by them to list the things intended to be searched for, that no intimation was given to the Police Station where the search of place is situated and no information was passed on to the Magistrate about the intention of search by them as contemplated under Section 164(4) of the Code. It held that on account of these infirmities, possession of railway property by A-1 cannot be believed and since there was no property recovered from A-2, even the guilt of A-2 was not proved beyond all reasonable doubt by prosecution. It also noted that even if the seizure is to be believed, M.Os.1 to 30 are broken CST-9 plates and P.W.5 has clearly stated that the property is unserviceable and unserviceable material is liable to be auctioned in the Railways. It noted that there is no theft report with respect to M.Os.1 to 30 and the prosecution had not disclosed why and for what purpose

the search was conducted by RPF. It accepted the evidence of A-1 that RPF officials are habituated to book him in false cases for not obliging them; in C.C.No.51 of 2003 he was acquitted by the same Court on 10-08-2004; and on the date of acquittal, the present case has been booked against him. He also stated that as soon as he came out of the Court and when he reached near the gate, the RPF officials confronted him and threatened him that they would book him in another case and accordingly they booked the present case. He also examined D.W.2, his friend in this regard. The Court below noted that six months after the arrest of A-1, A-2 was arrested. It observed the demeanor of accused and held that they belong to middle class Muslim family and that they do not have the habit of spending money in luxuries and their conduct and behaviour during trial indicates that they are God fearing. It therefore concluded that the accused are not guilty of the offences with which they are charged.

6. Aggrieved thereby this appeal is filed by the State.

7. The learned Public Prosecutor appearing for the State of Andhra Pradesh contended that omission on the part of the RPF to join with them some independent and respectable persons of the locality to witness the recovery would not render it inadmissible and relied upon the judgment of Supreme Court in **State of Punjab Vs.**

Wassan Singh^[1]. He further contended that the provisions of Section 100 of the Code were substantially complied with in as much as L.W.4 was taken as an independent witness at the time of search, but he did not come forward to depose since he went out of the State. He also relied upon the decision in **Kochan Velayudhan Vs. State of Kerala**^[2], and contended that failure to comply with the provisions regulating searches may cast doubts upon the bonafides of the officers conducting the search, but there is nothing in law which makes the evidence relating to an irregular search inadmissible, and once it is found that evidence of the recovery of articles in the search is reliable, a conviction based on such evidence is not invalid on the ground of irregularity in search.

8. The learned counsel for respondents, however, supported the judgment of the trial Court and contended that except the evidence obtained during search, there is no other independent evidence to prove the guilt of accused; that non-examination of L.W.4 is fatal to the case of prosecution and in fact there is no such person of L.W.4 and such person is a figment of imagination of prosecution. He contended that the requirement of Section 100(4) of the Code to have two independent witness is to ensure searches are conducted fairly and squarely and there is no planting of articles by

the police. He contended that non-compliance with the provisions under Sections 165 and 166 of the Code vitiates the case of prosecution. He relied upon the judgment of the Supreme Court in **Manish Dixit and others Vs. State of Rajasthan**^[3]. He pointed out that on the date of acquittal of the case in another case C.C.No.51 of 2003 i.e. on 10-08-2004 the present case has been booked by RPF and the RPF officials are habituated to book false cases against the accused for not obliging them. He pointed out that the very fact of arresting A-2 six months after the arrest of A-1 without finding any material in his possession creates a suspicion about the manner in which the accused were involved in the case by prosecution. Therefore prayed that the appeal be dismissed.

9. I have noted the submissions of both sides.

10. Section 100 of the Code deals with provisions for search of closed places. Sub-Section (4) of Section 100 states:

“ 100. Persons in charge of closed place to allow search.-

... ..

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the

search and may issue an order in writing to them or any of them so to do.”

11. The main objective of this provision is to ensure that searches are conducted fairly and squarely and there is no planting of articles by police. This provision ensures that two independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search.

12. In **State of Punjab** (1 supra), the respondent before the Supreme Court had been acquitted of a charge of double murder by using of rifles. In that case one of the contentions raised was that investigating officer did not join with him independent persons or respectable persons of the locality to witness the recovery of rifle used by the accused. In that context, the Supreme Court observed:

“The omission on the part of this investigating Officer to join with him some independent persons or respectables of the locality to witness the recovery, devalues that evidence but does not render it inadmissible. Although a suggestion of ‘planting’ the rifle, and fabricating the evidence of the empty cartridge (C-1) was put to Sub-Inspector Bishamber Lal in cross-examination, no such allegation was made, nor any such plea was set up by Mukhtar Singh accused when the evidence relating to the recovery of the two empties from the spot, the discovery of the rifle (Ex.P.7) at his instance and the opinion (Ex.PQ) of the Ballistic Expert was put this accused in his examination under Section 342 Cr.P.C. The circumstances of the recovery of the rifle (Ex.P.7) and the opinion of the Ballistic Expert that the empty cartridge

(marked C-1) (found on August-4, at the scene of murder) had been fired through the rifle (Ex.P7); - though feeble it might be – was relevant and furnished a further pointer to the participation of Mukhtar Singh in the commission of Hazara Singh's murder by rifle-fire”.

13. From the above passage, it is clear that there was no cross-examination to the investigating officer about planting of rifle or fabricating of evidence and recovery of empty cartridge or discovery of rifle. Moreover, there was evidence of Ballistic Expert that the empty cartridge recovered at the scene of murder was fired from the rifle produced by accused. Therefore, the observation of the Supreme Court that “the omission on the part of investigating officer to join with him some independent witness or respectables of the locality to witness the recovery, devalues that evidence, but does not render it inadmissible” would indicate that if there is other evidence apart from the seizure pointing to the guilt of accused, then it is permissible for the Court to rely on the evidence of investigating officer about seizure of material object even if there are no independent respectable persons of the locality, who witnessed the incident.

14. In the present case, the allegation is one of possession of railway articles by accused and the only evidence of that possession is recovery of M.Os.1 to 30 by RPF from A-1. Therefore, since the prosecution has claimed that L.W.4 was a witness to the recovery, it was bound to produce LW.4 in support of its case but it has

failed to do so. In my opinion, this is fatal to the case of prosecution since it is not the case of prosecution that none was available to witness the recovery.

15. As regards non-compliance with Sections 165 and 166 of the Code, it is not disputed that the search in question as well as the seizure of material objects by RPF was conducted not within the precincts of the Railways but outside the jurisdiction of the RPF. It is also not disputed that provisions of the Code are required to be followed for prosecution of offences under the Act. Section 165 of the Code states :

“165. Search by police officer.- (1) Whenever an officer in charge of police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police officer proceeding under sub-section (1), shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance to the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate”.

Section 166 of the Code states:

“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 (if any) 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)."

16. It is not disputed that no list of things to be searched was prepared by the RPF; no intimation was given to the Police Station in which the place of search was situated; and no information was passed on to the Magistrate informing the intention of conducting search by the RPF as contemplated under Section 164(4) of the Code.

17. The learned Public Prosecutor relied upon the judgment in **Kochan Velayudhan** (2 supra) in particular para No.21 thereof where the Full Bench of Kerala High Court quoted the decision in **Ramarao Ekboa Vs. The Crown** ^[4]. The Kerala High Court took note that although the failure to comply with the provisions of regulating searches may cast doubts upon the bonafide of the officers conducting the search, there is nothing in law which makes the evidence relating to an irregular search inadmissible and a conviction based on such evidence is not invalid on that ground alone. It held that once even the evidence of recovery of articles in the search is reliable, a conviction based on such evidence is invalid on the ground of irregularity in search.

18. However, the Supreme Court of India in **Manish Dixit** (3 supra) after quoting Section 166 of the Code held :

“24. It is evident from sub-section (3) that it permits an investigating officer belonging to one police station to search any place falling within the limits of another police station in certain exigencies. One such exigency is when there is possibility of delay in requisitioning the services of police personnel of another police station and such delay could defeat the very purpose of the search, then the investigating officer can proceed to that other place and conduct the raid or search by himself. However, when he does so he is obliged to conform to certain requirements as prescribed in sub-section (4). One is that he shall inform the officer in charge of the other police station and send him a copy of the list prepared by him in the search. Secondly is that he should send the copies of the search documents to the nearest Magistrate who has the competence to take cognizance of the offence.”

19. In that case, a firearm was recovered by a police officer from a hotel and the said officer, under whose leadership the raid was conducted on the hotel, had stated in his cross-examination that he had given information to the higher officer of the area where the hotel was located, who agreed to inform the police officers of the area at their own level. Therefore the Supreme Court did not accept the contention that there was a violation of Section 166 of the Code.

20. Having regard to the observations of the Supreme Court at para-24 of the above judgment it is clear that when the investigating officer belonging to one police station intends to search any place falling within

the limits of another police station, and if there is a possibility of delay in requisitioning the services of police personnel of another police station and such delay could defeat the very purpose of the search, he can proceed to that place and conduct the raid or search by himself, but he is obliged to conform to the requirements as prescribed in sub-section (4) of Section 166 of the Code.

21. In this view of the matter, the decision in **Kochan Velayudham** (2 supra) that the evidence collected during an irregular search is admissible even if there is failure to comply with the provisions relating to searches as laid down in the said decision cannot be treated as a good law.

22. Apart from the above points, the Court below had opportunity to consider the demeanor of the accused before it; and it believed the evidence of A-1 that the present case was booked by the RPF on the day when he was acquitted in C.C.No.51 of 2003 i.e. on 10-08-2004, that when he was coming out of the Court and reached the gate, the RPF officials confronted him and threatened that they would book another case against him and have booked this case. It also noted that no material was found in possession of A-2 and he was arrested 6 months after the arrest of A-1. No satisfactory explanation has been given by prosecution to say that these findings of the Court below are erroneous.

23. Apart from the above circumstances, it is not disputed by the prosecution that M.Os.1 to 30 are broken CST plates and P.W.5 had admitted that property which is unserviceable was liable to be auctioned in the Railways. It is not the case of the prosecution that there was a theft report with respect to M.Os.1` to 30. Therefore, the possession of Railway property by A-1 cannot be believed and in any event, since there was no property recovered from A-2, even A-2 cannot be held guilty.

24. The scope of interference in appeal under Section 378 of the Code is laid down succinctly in

Chandrappa and others Vs. State of Karnataka^[5], as under :

“(1) An appellate court has full power to review, reappreciate 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.”

25. The above principle was reiterated in **State of Rajasthan v. Mohan Lal**^[6] and recently in **Satvir Singh v. State of Delhi**^[7].

26. Having regard to the legal position set out above, I am of the opinion that the prosecution has not been able to prove the guilt of accused beyond all reasonable doubt and that the presumption of innocence of accused has been strengthened by their acquittal in the Court below. It is not a fit case for interference with the judgment of the Court below.

27. Therefore, the Criminal Appeal is dismissed.

28. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 27-01-2015

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- [\[1\]](#) AIR 1981 SC 697
- [\[2\]](#) 1961 (1) CRI.L.J. 70
- [\[3\]](#) (2001) 1 SCC 596
- [\[4\]](#) AIR 1951 Nag 237
- [\[5\]](#) (2007) 4 SCC 415
- [\[6\]](#) (2009) 12 SCC 515
- [\[7\]](#) (2014) 13 SCC 143