

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.1413 of 2016**

Umesh Waghmare son of Nagorao Waghmare, aged about 34 years, R/o Sakin Bhelwapder, Kondagaon, District Kondagaon (CG).

---- Appellant

Versus

State of Chhattisgarh, through Police Station, Kondagaon, District Kondagaon (CG).

---- Respondent

For Appellant	Shri Shobhit Kosta, Advocate.
For respondent/State	Shri Ashok Swarnakar, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

01/12/2016

1. The instant appeal has been preferred against the judgment dated 19.09.2016 passed by the Additional Sessions Judge, Kondagaon in Misc. Criminal Case No. 9 of 2016. vide the impugned judgment, the court below has rejected the application filed under Section 452 CrPC by the appellant seeking for return/custody of the mobile phone belonging to the appellant which was seized in connection with a criminal case levelled against the appellant.
2. The brief facts relevant for disposal of this appeal is that, a complaint was lodged against the appellant in connection with Crime No.191 of 2015 registered at Police Station, Kondagaon, on 20.07.2015. As per the complaint, the appellant had taken certain obscene pictures of the complainant and had later on used those pictures for blackmailing her

and also had sexually exploited the said complainant for a considerable period of time on threat of blackmailing. An FIR was registered and after investigation, the matter was put to trial before the Additional Sessions Judge, Kondagaon vide Sessions Trial No. 94 of 2015 and the appellant was charged for the offence punishable under Section 376 IPC as also under Section 6(e) of the Information Technology Act, 2000.

3. The EMIE number of the mobile phone belonging to the appellant was 354912/05/819422/4 and it was of Samsung make, Model No. GT-1. The said mobile was seized from the possession of the appellant. Subsequently, the said Session Trial was resulted in honourable acquittal of the appellant. The finding of the court below was that since the prosecution has failed to prove its case beyond all reasonable doubts, therefore, the offence for which he was charged could not be established and therefore, he stood acquitted from the charges. However, the Sessions Court while acquitting the appellant in the usual manner has passed the judgment holding that the seized property may be destroyed after the appeal period is over.
4. Immediately thereafter, the appellant moved an application before the same court i.e. Additional Sessions Judge, Kondagaon, under Section 452 CrPC seeking for return of the mobile phone seized from his possession during the course of investigation. It was stated in the application that the mobile phone seized in the criminal case belonged to the appellant and this fact was also accepted by the complainant herself in her deposition. The appellant had also produced purchase

bill of the mobile phone so as to assert his contention of being the owner of the said mobile phone. It was also asserted that the said phone was no longer required for the trial in any manner for the reason that before the court below the case of the prosecution stood collapsed and as such the appellant was acquitted from all the charges. Under the said circumstances, the mobile phone belonging to the appellant was liable to be returned back to its actual owner i.e. the appellant.

5. The court below, however, registered the application under Section 452 CrPC as Misc. Criminal Case No.09 of 2016 and vide its impugned order dated 19.09.2016 rejected the application. The sole ground for rejection of said application was that while the judgment in Sessions Trial was being passed, the judge deciding the matter in the operative part of the judgment has held that the seized property has to be destroyed after the period of appeal is over. According to the court below, since there was such an observation in the judgment of Sessions Trial, the court does not have the power to reconsider the said direction while entertaining an application under Section 452 CrPC, and therefore, rejected the same leading to filing of this appeal.
6. Learned counsel appearing for the appellant assailing the said impugned order submits that the rejection of his application is bad in law for the reason that once when the trial has culminated in the acquittal of the appellant, the property which was seized from the appellant during the course of trial should have been returned back to its actual owner. He took the court through the provisions of Section 452 CrPC, which for ready reference is reproduced as under :

“452. (1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

2. An order may be made under Sub-Section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under Sub-Section (1) is modified or set aside on appeal or revision.

3. A Court of Session may, instead of itself making an order under Sub-Section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in sections 457, 458 and 459.

4. Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of Sub-Section (2), an order made under Sub-Section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.

5. In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.”

7. Referring to the aforesaid provision, counsel for the appellant submits that the court after conclusion of trial ought to have ordered for “releasing of the property to any person claiming to be entitled to possession thereof”. According to him, it is undisputed and admitted position that the mobile phone belonged to the appellant and that the appellant had along with application under Section 452 CrPC also enclosed the bill in respect of purchase of the said property. In addition, the appellant also referred to the deposition of the complainant in the Sessions Trial wherein the complainant had

accepted the fact that the property belonged to the appellant herein and under the given admitted factual position, the court should not have had any reservations in releasing the property to the appellant herein and thus sought for setting aside of the order dated 19.09.2016.

8. The appellant raised another issue that the incriminating material for the charge which was levelled against him in the Sessions Trial were infact the data inside the mobile phone i.e. obscene pictures which were stored in the mobile and as such it was those pictures which were incriminating and not the mobile set as such and no fruitful purpose would be served in destroying the mobile set.
9. In support of his contention, he relied upon the decision of MP High Court in the case of Vishnuram Agrawal and Others Vs. South Eastern Coal Fields Ltd., reported in 2000 (2) MPLJ 265. Referring to paragraph 8 of said judgment, it is submitted that the MP High Court in a similar set of facts, had ordered that under the said factual circumstances the property should be released to the person who owns it. For ready reference, paragraph 8 of said judgment reads as under :

“8. The law about release of possession of property which is seized as stolen property under Section 452, Criminal Procedure Code is that the court may make such order as it thinks fit for the disposal or deliver to any person claiming to be entitled to possession of the property produced before the court or regarding which an offence appears to have been committed. This order is to be passed on conclusion of the trial. The most relevant words are “delivery to any person claiming to be entitled to possession thereof” for deciding whether the person is entitled to delivery of such property about which offence of receiving it as stolen property is tried. The court has to proceed on prima facie evidence and not to act as Civil Court deciding question of title. When property is seized from a person who is in possession, ordinarily it will be released back to him if the offence is found not established in respect of the property and no finding is given that although property belonged to the

complainant the accused did not know that it was stolen. If the finding is of the later type, then, of course, the complainant would be entitled to possession of the property. In the present case that finding has not been reached and the property was seized from the premises of the accused.”

10. Learned counsel for the State in the peculiar facts and circumstances of the case submits that so far as the claim of the appellant is concerned, the same appears to be genuine and fair claim, however, it is submitted that since the sessions court has already ordered for destruction of the said property, the court below while entertaining the application under Section 452 CrPC could not have taken a different view or else it would amount to review of the said order or if not, it would amount to rehearing on the issue of the seized property.
11. At this juncture, it would be relevant to refer to the decision of Supreme Court in case of N. Madhvan Vs. State of Kerala, reported in AIR 1979 SC 1829 wherein the Supreme Court in very categorical terms has held that under normal circumstances, the articles which have been seized, after completion of trial, should be handed over to the person from whom it is seized unless it is otherwise proved to be belonging to a third person.
12. In the instant case, the undisputed facts is that there is no claim over the said mobile set by any other person; the complainant in the Sessions Court herself has accepted that the mobile belonged to the appellant; the appellant has also been able to produce the bill so far as purchase of the said mobile phone is concerned. Above all the appellant has also been acquitted from the criminal case after holding that the charge against the appellant as not proved.

- 13.** Under these circumstances, this court does not find any good reason why the mobile phone belonging to the appellant should not be returned back to him in case if it is not required in any other proceedings including appeal, if any, preferred by the State or by the complainant.
- 14.** In another case of Pushkar Singh Vs. State of Madhya Pradesh and Another, reported in AIR 1953 SC 508, the Supreme Court had laid down the principle that before taking a decision by the court in respect of handing over of the seized property to another person, it is incumbent upon the court to give notice to the person from whom it was seized so that the person from whom it was seized can also get an opportunity to give his explanation.
- 15.** In the context of the said judgments also if we look into the facts of the present case, the admitted position from the evidence that has come before the court in Sessions Trial No.94 of 2015 is that, the mobile set belonged to the appellant as has been admitted by the complainant herself. Further, it was the said mobile set belonged to the appellant in which the appellant had allegedly captured certain obscene pictures of the complainant which establishes the fact that it was the mobile belonging to the appellant. Therefore, there would not have been any necessity for even seeking an explanation from the complainant in this regard.
- 16.** On an earlier occasion, this court also in case of Manharan Vs. The State of Chhattisgarh & Another (Criminal Appeal No.1181 of 2003, decided on 14.05.2014) in somewhat similar circumstances had

ordered that the property which has been seized from the appellant therein under normal practice should be handed over to the person from whom it was seized after the conclusion of trial. In the said case also the property was seized from the appellant therein, but after the trial judge had ordered for releasing of the said seized articles to the complainant and on facts the accused persons were acquitted of the charge. Setting aside the said observations of the trial court, this court had ordered for releasing of the property to the person from whom it was seized unless otherwise, claimed or proved by any third party.

17. In the instant case also there is no third party coming up for claiming of said mobile phone and the complainant herself in Sessions Trial had admitted that the appellant was the actual owner of the mobile phone. Under the given facts and circumstances of the case, the impugned order dated 19.09.2016 passed by the 1st Additional Sessions Judge, Kondagaon, in Misc. Criminal Case No.09 of 2016 is not sustainable and the same deserves to be and is accordingly set aside.
18. It is ordered that mobile set (Samsung make, EMIE No. 354912/05/819422/4) which belongs to the appellant be released to him after taking sufficient security/conditions which may be imposed by the court below unless the property is not required for any other case.
19. The appeal is allowed.

Sd/-
(P. Sam Koshy)
Judge