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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Criminal Appeal No.13 of 2010

State,
Represented by
the Assistant Sub Inspector of Police,
Railway Protection Force,
Nagapattinam.
(Cime No.5/2003) ..Appellant/Complainant

Vs

P.Rajendran ..Respondent/Accused

Prayer:- Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the judgment of acquittal dated 18.06.2009 passed in C.C.No.455 of 2003 by the learned Judicial Magistrate Court No.I, Nagapattinam.

For Appellant : Ms.T.P.Savitha
Govt. Advocate (Crl.side)

For Respondent : Mr.P.Muthamizh Selva Kumar

J U D G M E N T

The present appeal has been filed to set aside the judgment of acquittal dated 18.06.2009 passed in C.C.No.455 of 2003 by the learned Judicial Magistrate Court No.I, Nagapattinam.

2. The respondent is the sole accused in C.C.No.455 of 2003 on the file of the learned Judicial Magistrate Court No.I, Nagapattinam.

(i)The respondent/accused stood charged for the offence under Section 3(a) of Railway Property (Unlawful Possession) Act 1966. By judgment dated 18.06.2009, the learned Judicial Magistrate Court No.I, Nagapattinam acquitted the respondent for the charges framed against the respondent. Aggrieved by the order of acquittal, the appellant is before this Court by way of filing the present Criminal Appeal praying to set aside the order of acquittal and for convicting the respondent.



3. The case of the prosecution in brief is as follows:

(i) On 15.05.2003, at about 5.15 hours, in between Nagapattinam railway station and Beach Station, the Deputy Sub Inspector of Police, Railway Protection Force, North, Nagapattinam made a search with regard to the stolen properties. During the time of search, the respondent came from Railway Station Goods shed, near to Electrical Post No.51, by carrying a polythene cover. On search, the Deputy Sub Inspector of Police, found that the respondent was carrying with two break blocks belong to the Railway Department which was kept inside the polythene cover. On enquiry, he admitted the guilt and gave confession statement before the said Deputy Sub Inspector of Police under Ex.P.2. After recording the confession statement given by the respondent, the said Sub Inspector recovered the said break blocks under a cover of mahazar in the presence of P.W.2 and 3, who are the Head Constables working in the Railway Protection Force. The recovery mahazar prepared by the Sub Inspector of Police was exhibited as Ex.P.1. Subsequent to recovery, he prepared a report with regard to the occurrence. Further, he recorded the statements of P.W.2 and P.W.3. In continuation of investigation, he sent the recovered material objects to P.W.4 for finding out whether the said break blocks are already sold in the auction or not.

(ii) On verification, it was found that the said material objects are unsold material belongs to Railway Department. After completing the above formalities, he filed a complaint in the Court.

(iii) The learned Judicial Magistrate No.I, after taking cognizance, issued summons to the Accused for his appearance. After the appearance, the Special Sub Inspector was examined as P.W.1. on the side of the prosecution. Further, two Head Constables said to be the witnesses for the recovery have been examined as P.W.2 and P.W.3. An officer, who issued certificate in respect of M.O.1, was examined as P.W.4. Thereafter, charges have been framed for the offence under Section 3(a) of Railway Property (Unlawful Possession) Act 1966 and read out to the respondent. He denied the charges and opted for the cross examination of P.W.1 to P.W.4. Therefore, after framing charges, P.W.1 to P.W.4 were recalled and cross examined on the side of the respondent.

(iv) Out of the said witnesses, P.W.1 has stated in his evidence as on 15.05.2003, during the time of search, he found the respondent with the material objects recovered in this case. Further, he stated that on enquiry, the respondent gave a statement in which, he admitted the guilt as alleged in this case. He also stated about the details of recovery and with regard to filing of complaint before the learned Judicial Magistrate.



(v) P.W.2 and P.W.3 are the Head Constables working in the Railway Protection Force have stated in their evidence about the securing of respondent by P.W.1 and in respect of the statement given by the respondent and about the recovery of railway properties.

(vi) P.W.4 also stated in his evidence that the properties, which were recovered from the respondent belong to Railway Department, in earlier it have not been sold out through auction.

(vii) Thereafter, based on the incriminating materials available in the prosecution side evidence, the respondent was examined under Section 313 Cr.P.C. At that stage, the respondent denied the evidence put forth by the prosecution as false. Subsequently, after concluding the trial proceedings, the learned Magistrate found that the respondent is not guilty of the charges as mentioned above and acquitted him. Against the said order of acquittal, the respondent is before this Court.

4. Today, when the appeal is taken up for consideration, I have heard Ms. T. P. Savitha, learned Government Advocate (Crl. Side) appearing for the appellant/State and Mr. P. Muthamizh Selvakumar, appearing for the respondent.

5. The learned Government Advocate (Crl. Side) for the appellant would contend that as per the Railway Act 1989, the statement given by the respondent before the officer of the Railway Protection Force is admissible in evidence. In this case during the time of investigation, the respondent admitted the guilt and gave confession statement before the P.W.1. The trial Court without considering the same acquitted the accused is an error. Further, he relied on the decision of the Hon'ble Supreme Court in *Balkishan A. Devidayal vs. State of Maharashtra* (1980 Cri L.J. 1424), in which, the Hon'ble Supreme Court held as follows:

"In the light of the above discussion, it is clear that an officer of the RPF conducting an enquiry under Section 8(1) of the 1966 Act has not been invested with all the powers of an officer-in-charge of a police station making an investigation under Chapter XIV of the Code. Particularly, he has no power to initiate prosecution by filing a charge-sheet before the Magistrate concerned under Section 173 of the Code, which has been held to be the clinching attribute of an investigating 'police officer'. Thus, judged by the test laid down in *Badku Jyoti Savant's Case*, which has been consistently adopted in the subsequent decisions noticed above, Inspector Kakade of the RPF could not be deemed to be a 'police



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officer' within the meaning of Section 25 of the Evidence Act, and therefore, any confessional or incriminating statement recorded by him in the course of an inquiry under Section 8 (1) of the 1966 Act, cannot be excluded from evidence under the said section."

6. So it is already settled by our Hon'ble Apex Court that the statement given before the Officer of the Railway Protection Force is admissible in evidence.

7. Secondly, the learned Government Advocate (Crl. side) would further contend that during the time of occurrence, since the independent witnesses were not available in the occurrence place, P.W.1 called P.W.2 and P.W.3 and requested them to stand as witness. In the said circumstances, non examination of the independent witnesses is not fatal to prosecution. Further, she relied on the judgment of this Court in Crl.R.C.No.16 of 1987 and Crl.R.P.No.16 of 1987 dated 18.07.1991 in the case of S.A. Babu vs. State by Sub Inspector of Police, Railway Protection Force, Trichy Goods Yard, Southern Railway, Tiruchirapalli, wherein, it is held as follows:

"Railway Property (Unlawful Possession) Act (XXIX of 1966), Sec.3(a) - Offence under - Witness belonging to Railway Protection Force - If Ground to eschew his testimony.

The fact that the witness belongs to the railway protection force is not by itself sufficient to eschew his testimony out of consideration. His evidence has to be viewed, analysed and applied to the case in the adjudication of the guilt or otherwise of the accused as any other witness and if there are no infirmities or inherent improbabilities or material contradictions in his testimony then it goes without saying that there is nothing wrong in placing reliance on such testimony and fastening criminal liability upon the accused."

8. So, in this connection, this Court already held that the non examination of independent witnesses alone is non-fatal to prosecution. Accordingly, the learned Government Advocate prayed to set aside the order of acquittal.

9. On the other hand, the learned counsel for the respondent would submit that in respect to the recovery mahazar, preferred by P.W.1, the persons who attested in the said document, gave different versions about the place of



occurrence. Further, the evidence given by P.W.1, indicated that he has not made any efforts in securing the independent witness. The Law permits if the independent witness is not available in the place of occurrence, then the persons, who are working in the same department can be added as witnesses. But in this case P.W.1 has not stated about the efforts made in securing the independent witness.

10. He would further contend that the above lapse on the part of the prosecution proved that the respondent has been falsely implicated in this case.

11. I have considered the rival submissions made by the learned counsel on either side.

12. On going through the evidence given by P.W.1 Anwar Basha, it appears that the respondent was secured by P.W.1 between Nagapattinam and Beach Railway Station. In this regard, P.W.2 Navaneethan has stated in his evidence that the respondent was secured by P.W.1 near to the Railway goods shed. Another witness P.W.3 has stated that P.W.1 secured the accused near the Yard water tank.

13. Now on considering the entire evidence given by P.W.1 to P.W.3, it appears that all the three witnesses, who are signed in the seizure mahazar have stated three different places in regard to the arrest, recovery and about the recording of confession statement from the respondent. In the said circumstances, it is the duty of the prosecution to prove that all the places are situated one another one. For proving the said fact, the rough sketch with regard to the place of occurrence is very much necessary. But in this case no such sketch was preferred by P.W.1.

14. Moreover, according to the evidence given by P.W.1, P.W.2 was examined by P.W.1 on the same day of occurrence. But, P.W.2 has stated that he was examined by P.W.1 after one month from the date of occurrence. Considering the said contradiction with the earlier discussions with regard to the place of occurrence, creates a doubt whether the respondent was secured by P.W.1 as stated in the evidence of P.W.1 or not.

15. One another aspect in this case is that in the confession statement, statement given by the respondent, and in the Mahazar preferred by P.W.1 for the recovery of M.O.1 and M.O.2 was attested by P.W.2 and P.W.3. Admittedly, they are the Head constables, who are working in Railway Protection Force. Now on going through the evidence given by P.W.1, he has stated that due to non availability of independent witnesses, P.W.2 and P.W.3 are stand as witnesses to the confession statement and mahazar. In this regard P.W.1 has not stated anything about the attempt made by him in securing the independent witnesses.



16. Further on going through the evidence given by P.W.1 to P.W.3, the alleged occurrence had happened near the railway station, Nagapattinam. Further, the accused was secured at about 5.30 a.m in the early morning. No doubt, in the said time people are came out from their house for attending the regular work. In the said circumstances, without taking any efforts for securing the independent witness, called the Head Constables for standing as a witness, is not a bona-fide reason. Apart from that the value of the properties, possessed by the accused in this case is Rs.400/- only.

17. Furthermore, in an appeal against acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him, and the fundamental principle of criminal justice delivery system is that every person, accused of committing an offence shall be presumed to be innocent, unless his guilt is proved by a competent Court of law. Secondly, if the accused has secured an order of acquittal, the presumption of his innocence is reaffirmed and strengthened by the trial Court. Even if two reasonable conclusions are possible on the basis of evidence on record, the appellate Court should not disturb the finding of the acquittal recorded by the trial Court. In this case also the evidence put forth by the prosecution witness create a doubt as to whether the respondent is secured in a place now stated by the P.W.1. Secondly even after knowing the fact that the statement given by the Accused is admissible in evidence the said document have not been preferred by P.W.1 in the presence of independent witness.

18. In the above said circumstances, I find no reason to interfere with the impugned order of acquittal passed by the trial Court. Hence, the appeal fails and the same deserves to be dismissed.

In the result, the Criminal appeal is dismissed. The judgment dated 18.06.2009 passed in C.C.No.455 of 2003 by the learned Judicial Magistrate No.I, Nagapattinam in confirmed.

Sd/-

Assistant Registrar(CS-IV)

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Sub Assistant Registrar



To

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1. The Judicial Magistrate No.I,
Nagapattinam.

2. The Assistant Sub Inspector of Police,
Railway protection Force, Nagapattinam.

3.The Public Prosecutor,
High Court, Madras.

+ 1 cc to Mr. P. Muthamizh Selva Kumar, Advocate Sr.52555

Cr1.A.No.13 of 2010

GJII(CO)
EU(23/10/2018)