



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

CrI.A (MD)No.56 of 2016

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The State Rep. by
The Public Prosecutor,
Hight Court of Madras,
(RPF.Karaikudi
Crime No.3/2003)

: Appellant / Complainant

Vs.

1.D.Sethu
2.G.Babu

: Respondents / Accused No.1 & 2

PRAYER: The Criminal Appeal is filed under Section 378 of the Code of Criminal Procedure, to allow the appeal and set aside the judgment of acquittal of the respondents/accused (A-1 & A-2) passed by the Court of the Sessions Judge, Sivagangai in C.A.No.23/2011 dated 30.10.2014.

For Appellant : Mr.E.Antony Sahaya Prabahar
Government Advocate (crl.side)
For Respondents : Mr.S.Poorna Chandran

JUDGMENT

Aggrieved over the order of acquittal dated 30.10.2014 made in CrI.A No.23 of 2011 on the file of the learned Sessions Judge, Sivagangai, the appellant, who is the respondent in the said appeal, preferred this criminal appeal and prayed to set aside the judgment dated 30.10.2014.

2.For the easy reference hereinafter the appellant is called as complainant and the respondents 1 and 2 are called as accused Nos. 1 and 2.

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

(i)During the relevant point of time, PW1-Philips Jayakumar was working as Inspector of Police, Railway Protection Force, Virudhunagar. On 20.10.2003, he received the information that the first accused unlawfully possessed the property which belongs to the railway. Immediately, after receipt of the said information, he obtained the search warrant and on the same day around 2.30 pm in the presence of first accused, who is the owner of the Sawmill, he conducted the search in a shop situated at No.22, Railway Main Road, Karaikal. During enquiry, the first accused made a



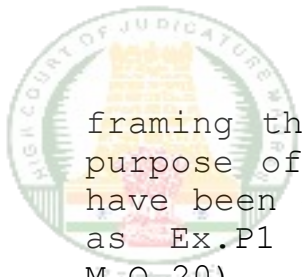
statement as on 18.10.2003 around 4.00 pm by using the Mini lorry bearing Registration No.TN 72 B 1456, the accused Nos.3 to 7 had handed over the said wooden pieces and requested to cut the said wooden pieces.

(ii) In respect to the possession, the first accused did not having any valid authorisation. Hence, PW1 prepared a search list and in the presence of PW2-Samayadurai and one Kalyanasundaram, he recovered the wooden pieces M.O.1 to M.O.19. Further, he has recorded the confession statement from the first accused under Ex.P2 and after recording the confession statement, he arrested the first accused, brought him to the Karaikudi Railway Protection Force outpost and registered the case against the accused in Crime No.3 of 2003 under Section 3(a) of Railway Properties (Unlawful Possession) Act (hereinafter referred as "the Act"). The copy of the occurrence report was marked as Ex.P3. On 21.10.2003, he produced the accused along with recovered wooden sleepers before the Court, which is having the jurisdiction.

(iii) In continuation of investigation, on 22.10.2003 around 7.00 am in Karaikudi main road, he recovered the Minilorry bearing registration No. TN-B-1456 under a cover of mahazar Ex.P4. He also arrested the driver of the lorry, who is arrayed as second accused in this case. Before the trial Court, the said lorry was marked as M.O.20. In the meantime, on 19.10.2003, PW5-Ramanath, who is the Senior Engineer submitted the report stating that the wooden sleeper fitted in the railway track in Km 506/11-12 was stolen away. In this regard, he issued the certificate under Ex.P11. After obtaining the said certificate, PW1 examined the witnesses, recorded their statements and received the certificate that the first accused herein running the sawmill.

(iv) In the meantime, the other accused (A3 to A7) were obtained the Anticipatory bail and while at the time they were complying with the condition imposed by the Court, they had given confession statement before PW1 and the same has been recorded in the presence of PW4-Karunanithi. The value of the property recovered during investigation is Rs.3,000. Ultimately, after concluding the investigation, he filed the final report under Ex.P5.

4.After taking cognizance, in order to find out the prima facie case, the learned trial Judge, recorded the chief examination from PW1 to PW4. In turn, after satisfying with the prima facie case, the learned trial Judge framed the charges under Section 3(a) of the Act. All the accused denied the charges and opted for trial. Hence, in order to give opportunity to the accused and the witnesses who are all gave evidence previous to



framing the charge, were appeared before the trial Court for the purpose of cross-examination. Additionally, three more witnesses have been examined as PW5 to PW7 and 12 documents were exhibited as Ex.P1 to Ex.P12, besides, 20 material objects (M.O.1 to M.O.20).

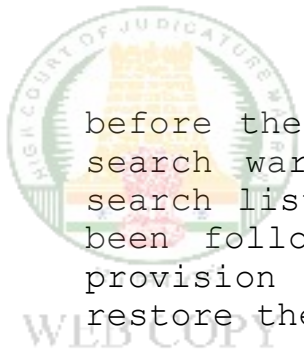
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5.After recording the evidence as above from the prosecution witnesses in respect to the incriminating materials available from the evidences given by the prosecution witnesses, all the accused were examined under Section 313 Cr.P.C, wherein they denied the evidences given by the prosecution witnesses as false. However, they did not choose to examine any witness nor mark any documents on their side.

6.Having considered all the materials placed before him and on considering the arguments advanced by the learned counsel appearing on either side, the learned trial Judge came to the conclusion that the accused 1 to 4, 6 and 7 are guilty under Section 3(a) of the Act and accordingly, they were convicted and sentenced to undergo Rigorous Imprisonment for one year each and to pay a fine of Rs.1,000/-, in default, to undergo Rigorous Imprisonment for three months each. Challenging the said conviction and sentence, the respondents 1 and 2/ accused Nos.1 and 2 preferred an appeal in C.A.No.23 of 2011 on the file of learned Sessions Judge, Sivagangai. By judgment dated 30.10.2014, the learned Sessions Judge, Sivagangai, allowed the appeal and setting aside the conviction and sentence passed by the trial Court. Challenging the said judgment, the appellant/complainant is before this Court praying to set aside the order of acquittal.

7.The learned Government Advocate (crl.side) appearing for the appellant would contend that the First Appellate Court while at the time of allowing the appeal came to the conclusion that Section 10 of the Act has not been followed and therefore, the respondents 1 and 2 are entitled the relief of acquittal. He would further submit that in the judgment rendered by the trial Court in respect to following the Section 10 of the said Act in paragraph Nos.20 to 22 observed that the search warrant has been issued on 20.10.2003 in M.P.No.5388 of 2003 and therefore, the non-filing of the search warrant could not be considered as a lapse on the part of the prosecution. In this regard, the First Appellate Court, without considering the said aspect in perspective manner, allowed the appeal which is erroneous in law. According to him, the conviction and sentence awarded by the trial Court has to be restored.

8.Per contra, the learned counsel for the respondents would contend that in view of the Act, after getting information, the prosecution authorities concerned should file an application



before the Jurisdictional Magistrate and only after obtaining the search warrant, they should conduct the search and prepare the search list. But here it is the case, the said procedure has not been followed and thereby, being the reason that the mandatory provision is violated, it is not necessary for this Court to restore the conviction and sentence.

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

10.Admittedly, before the trial Court, the copy of the application filed for issuing the search warrant and the copy of the search warrant issued by the Jurisdictional Magistrate were not marked as exhibit. In this occasion, it is necessary to see Section 10 of the Act, which reads as follows:-

10. Issue of search warrant.-

(1) If an officer of the Force has reason to believe that any place is used for the deposit or sale of railway property which has been stolen or unlawfully obtained, he shall make an application to the Magistrate, having jurisdiction over the area in which that place is situate, for issue of a search warrant.

(2) The Magistrate to whom an application is made under sub-section (1), may, after such inquiry as he thinks necessary, by his warrant authorise any officer of the Force-

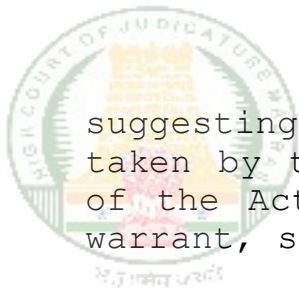
(a) to enter with such assistance as may be required, such place;

(b) to search the same in the manner specified in the warrant;

(c) to take possession of any railway property therein found which he reasonably suspects to be stolen or unlawfully obtained; and

(d) to convey such railway property before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety.

11.The said Section is clear and narrow that after getting information or otherwise, the officer has reason to believe that any place is used for the deposit or sale of railway property, he shall make an application to the Magistrate for issuing the search warrant. In this regard, during the time of cross examination, before PW1 who is the Officer alleged to obtain the search warrant and conduct the search, it was suggested by the accused that there is no application has been filed to obtain the search warrant. Therefore, after suggesting as above, it is for the prosecution to call the records pertain to the search warrant and mark the same as exhibit. But, here it is the case, even after



suggesting as above on the side of the accused, no steps have been taken by the prosecution to show only after complying Section 10 of the Act, PW1 obtained the search warrant and upon the search warrant, search was proceeded in A1's Shop.

12. Therefore, the said act committed by the prosecution agency is nothing, but the prosecution agency, before the trial Court, had proceeded the trial in lethargic manner. Only on seeing the copy of the application filed before the Magistrate and on seeing the order passed on that application, we can conclude that PW1 filed the application for issuing search warrant in respect to the shop which belongs to A-1. Here it is the case, without any reason, the said application filed by PW1 has not found place in the case records. Further, the same has not been exhibited. Therefore, the non-production of the copy of the application, which was filed for issuance of search warrant and also the non-production of the search warrant issued to the appellant, creates a doubt whether the alleged application has been filed in respect to the petition mentioned premise or not. In the said circumstances, I am of the considered opinion that the appellant herein has not approached the trial Court with clean hands and also the same amounts to non-proving of his case.

13. In view of the above discussions, this Criminal Appeal is dismissed by confirming the judgment dated 30.10.2014 made in C.A.No.23 of 2011 on the file of the learned Sessions Judge, Sivagangai.

Sd/-

Assistant Registrar (WRITS)

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/ /2021

Sub Assistant Registrar (CS)

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To:-

1. The Sessions Judge, Sivagangai.
2. The District Munsif cum Judicial Magistrate, Karaikudi.
3. The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai.



4.The Section Officer,
Criminal Section Records,
Madurai Bench of Madras High Court,
Madurai.

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