

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL REVISIONAL JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRR 3 of 2010

DINESH BARMAN

VS.

THE STATE OF WEST BENGAL & ANR.

For the Petitioner : Mr. Sabir Ahmed, Sr. Adv.
Mr. Biswajit Sarkar, Adv.

For the Opposite Party : Mr. B.K. Ray, Adv.
Ms. Sima Biswas, Adv.

For the U.O.I./Railways : Mr. Anirban Mitra, Adv.

Hearing concluded on : 15th September, 2023

Judgement on : 19th October, 2023

Siddhartha Roy Chowdhury, J.:

1. This is an application under Section 482 of the Code of Criminal Procedure impeaching the judgement and order passed by learned Additional Sessions Judge, Coochbehar in Criminal Appeal No. 1 of 2009 affirming thereby the judgement and order of conviction passed by learned 3rd Court of Judicial Magistrate at Coochbehar in C.R. Case No. 237 of 2001 under Section 3 (a) of the Railway Property (Unlawful Possession) Act, 1966, and by the impugned order the petitioner has been sentenced to suffer imprisonment for one year and to pay fine of Rs. 1000/- with a default clause.

2. Fact of the case in short is that on 19th October, 2001 at about 11.30 P.M. one Rajib Kumar Mishra received an information regarding theft in 5623 Up Cochin Express between New Coochbehar and Pundibari Railway Station, Rajib Kumar Mishra along with S.I. M. Prasad, A.S.I. N.C. Sarkar, Head Constable S.C. Roy and Constable Ali Hussain started track searching. At about one hour on 20th October, 2001, when they reached near K.M. 118/9/7-8 in between Pundibari and New Choochbehar, they noticed 4/5 persons were carrying something on their head on the right side of the railway track. They were proceeding towards Pundibari. The police party chased them and caught one of them at K.M. No. 118/9 while others managed to flee throwing away the articles they were carrying. The police personnel identified two of them as Jhola Mia of New Alipurduar and Abdul Mazid @ Uku Mia. The person apprehended introduced himself as Dinesh Barman and seized gunny bags of tea having mark as PW Bill 601632 P-3 Ex GHY-PDY via HWH/MAS dated 11th October, 2001 along with 9 bundles of resoling tyre materials in white plastic bag having railway mark PW Bill No. 573642 P/19 Ex ERS-GHY (M) 1.87 were recovered. The person could not produce any document to justify his possession and ultimately confessed he along with others committed theft from a luggage van of mail train which was going towards New Coochbehar. He was arrested and brought to R.P.F. Post where a complaint was filed against the accused persons. The properties recovered, was seized by the S.I. Rajib Kumar Mishra under a seizure list. The tea bags were

found in wet condition and were sold in a public auction on 1st December, 2001 with the approval of the Hon'ble Court and a sum of Rs. 2640 was appropriated as sale proceeds. Jhola Mia and Abdul Mazid surrendered to the jurisdiction of learned Chief Judicial Magistrate, Coochbehar. Police after completion of investigation submitted prosecution report having found prima face case against three accused persons for committing offence under Section 3(a) of the Railway Property (Unlawful Possession) Act, 1966.

3. Trial was commenced and learned Chief Judicial Magistrate, Coochbehar in course of trial recorded the testimony of 12 witnesses being examined by the prosecution and recorded order of conviction which was subsequently affirmed by the learned Additional Sessions Judge, Coochbehar. To prove the charge under Section 3 (a) of the Railway Property (Unlawful Possession) Act, 1966 says :-

“3. Penalty for unlawful possession of railway property.—Whoever is found, or is proved to have been, in possession of any railway property reasonably suspected of having been stolen or unlawful obtained shall, unless he proves that the railway property came into his possession lawfully, be punishable—

(a) for the first offence, with imprisonment for a term which may extend to five years, or with fine, or with both and in the absence of special and adequate reasons to be mentioned in the judgment of the Court, such imprisonment shall not be less than one year and such fine shall not be less than one thousand rupees;

4. The basic requirement to saddle one with criminal liability for committing offence under Section 3(a) of the Railway Property

(Unlawful Possession) Act, 1966, it is an essential to prove that the person was in possession of railway property and there is nothing to justify such possession.

5. From the attending facts of the case it is admitted that the accused person was arrested by a team of police personnel led by Rajib Kumar Mishra, S.I. of R.P.F. Rajib Kumar Mishra as P.W. 1 stated that at about 11.30 P.M. on 19th October, 2001 he received an information regarding commission of theft in the luggage van of Up Cochin Express in between New Coochbehar and Pundibari Railway Station. The number of luggage van was 98732. He along with ASI Nagendra Ch. Sarkar, Head Constable Subhas Ch. Roy proceeded towards the place of occurrence following the railway track and at about 1.00 A.M. they found 3/4 persons with some load over head. They were chased and police could manage to intercept one person who introduced himself as Dinesh Barman.
6. Police identified Abdul Mazid and Jhola Mia who managed to flee. Police further found three bags of tea and 9 bundles of resoling tyre by the side of the railway track. The accused persons tried to flee leaving those articles on the railway track. Dinesh Barman failed to produce any paper to justify his possession over those properties. Police seized those properties and accused Dinesh Barman confessed that he along with two other persons committed theft in respect of properties from the luggage van. During cross-examination after charge P.W. 1 denied all the suggestions given to him touching innocence of the accused person.

7. P.W. 2, Nagendra Ch. Sarkar another team member stated that police found 4/5 persons were walking down the passage by the side of railway track with load on their head. Police chased them and apprehended one of them with goods, who could not justify the possession, those goods were seized under a seizure list. Police also identified Jhola Mia and Uku Mia. The accused persons and seized articles were brought to New Coochbehar post. Subsequently, Jhola Mia was arrested and he made a confessional statement before A.S.I. Manohar Prasad and P.W. 2 put his signature as witness. During cross-examination the witness stated that the accused persons being chased by police along with others were fleeing from the spot deserting the goods.
8. P.W. 3, Sushil Kumar Ray, another raiding team member stated that on 20th October, 2001 Rajib Kumar Mishra brought one accused person to New Coochbehar R.P.F. Post with some railway properties. The accused person made a confessional statement which was recorded by P.W. 3 and the confessional statement is admitted as Exhibit-3.
9. P.W. 4, Molay Kr. Mitra stated that he was a railway Guard. On 19th October, 2001 he was discharging his duty as Guard of Cochin-Guwahati Express at 6.20 P.M. The said train left New NJP Station at about 10.00 P.M. it arrived at New Coochbehar Station. At 10.10 P.M. one R.P.F. personnel informed him that the left door of SLR on the front side of the train had no seal. He informed the Station Master and the door was resealed and the train left Coochbehar Station. The

train was stopped at the outer signal of Pundibari Station for 3 minutes. It was further stated by P.W. 4 that he took charge of the train, all the SLR van were sealed. After arriving at Bongaigaon station he was relieved. During cross-examination he stated that he was never informed about the commission of theft and he did not lodge any complaint regarding theft.

10. Subash Ch. Roy, one of the members of the raiding team of R.P.F. personnel stated that on 19th October, 2001 at about 11.30 P.M. he along with others were proceeding towards Pundibari Station. At about 1.00 A.M. they found three persons, carrying some load on their head. Police chased them and caught hold of one of them. He introduced himself as Dinesh Barman and the other two persons fled away. Dinesh Barman subsequently, disclosed the names of those two persons as Jhola Mia and Abdul Mazid. Three bags of tea and 9 bundles of resoling tyre were recovered from the possession of Dinesh Barman who failed to produce any paper to justify his possession. During cross-examination he could not say from whom the theft articles were recovered or who was carrying the articles.
11. Dhirendra Nath Chowdhury, P.W. 6 did not have any direct knowledge about the incident.
12. P.W. 7 Chandra Kanta Hazarika, the Commercial Supervisor of Guwahati Railway Parcel Office stated that Manohar Prasad seized some documents from his office on 24th March, 2002 under a seizure list and entrusted him with the custody of documents against a Zimmanama bond. He was not witness to the incident.

13. Pitambar Barkarti, P.W. 8 stated that some documents were seized by R.P.F. personnel from the Guwahati Parcel Office. P.W. 9, Babul Ch. Dutta stated that on 19th October, 2001 he informed that Guard of 5263 Cochin Express that front SLR luggage van no. 98732 was neither sealed nor locked. He informed that Guard and the Guard resealed the compartment. So is the evidence of Chittaranjan Sarkar, P.W. 10.
14. P.W. 11, Manohar Prasad stated that on 19th October, 2001 having been informed about theft he along with others proceeded towards Pundibari Station near K.M. 118/7-8, they found 4/5 persons carrying something on their head, being chased by police two fled away and they apprehended one person. The articles were seized. During cross-examination he stated that the seized articles were taken to Pundibari Railway Station and from there the articles were brought to New Coochbehar Station. P.W. 12, Rajendra Oraon investigated into the complaint but could not finish the same. Manohar Prasad was entrusted with the enquiry of the case.
15. No other witness was examined.
16. Upon careful perusal of the evidence it appears that information of alleged theft committed in between New Coochbehar and Pundibari Railway Station was received by P.W. 1 at about 11.30 P.M. and he along with Nagendra Ch. Sarkar left New Coochbehar Railway Station towards Pundibari Railway Station following the railway track. According to P.W. 1, three persons were found carrying something on their head and one of them was apprehended by police at about 1.00

A.M. P.W. 1 further stated that from near the rail post by the side of the railway track three bags of tea and 9 bundles of resoling tyre were recovered. This evidence unerringly indicates that nothing was recovered from the possession of Dinesh Barman. P.W. 2 Nagendra Ch. Sarkar stated that one person was apprehended with certain articles and during cross-examination he stated that when police chased those persons, they deserted the articles and started fleeing. Evidence of P.W. 2 also suggests that police recovered nothing from the possession of Dinesh Barman. P.W. 5, Subhas Ch. Roy could not say from whom the articles seized. Manohar Prasad, P.W. 11 stated that he and his other team members while proceeding towards Pundibari, they found that 4/5 persons who were carrying some articles on their head and being chased they fled away. One was apprehended, on search the R.P.F. personnel recovered three bags tea and 9 bundles resoling tyre. This evidence also suggests that nothing was recovered from the possession of Dinesh Barman. Therefore, the basic ingredient to constitute an offence i.e. unlawful possession of railway property could not be proved beyond reasonable doubt. Learned Trial Court while recording the order of conviction stated that the Railway Property (Unlawful Possession) Act, 1966, empowers police to record confessional statement but the statutory provision does not support such claim of learned Magistrate. Learned Appellate Court failed to appreciate the evidence on record in its proper perspective. That apart when we considered the entire narrative of prosecution witness from the point of view of human probability, it

becomes difficult to swallow that after committing theft the accused person was waiting near the place of occurrence till the police appeared there after more than one and half hour of incident.

17. Under such circumstances, I am of the view that the prosecution has failed to prove the case beyond reasonable doubt. The impugned judgement is manifestation of abuse of process of law which should not be allowed to remain in force and should be set aside, which I accordingly do. The petitioner therefore, deserves an order of acquittal. He be set at liberty and be released from bail bond.
18. Let a copy of this judgement be sent down to the learned Trial Court for information and necessary compliance.
19. Urgent certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)