
(2013) 11 BOM CK 0095

In the Bombay High Court

Case No : Criminal Writ Petition No. 84 of 2013

Bhagwat Rajaram Patil

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 22-11-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 702

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Judgement

A.M. Thipsay, J.—Rule. By consent, rule is made returnable forthwith. By consent, heard finally. The applicant is an accused in Regular Criminal Case No. 20/2000, pending before the Judicial Magistrate (First Class) [Railways], Bhusawal. The allegation against him is that, he has committed an offence punishable u/s 3(a) of the Railway Property (Unlawful Possession) Act, 1966 [For short, "RPUP Act"].

2. It is alleged in the complaint filed by one Ramjilal Tomar, Inspector, Railway Protection Force, Jalgaon, that on 18-7-1999, upon secret information received from the Head of the Railway Protection Force [For short, "RPF"], a raid was carried out at the premises of Dunhill Bright Bars Pvt. Ltd., situated at Manyarkheda, Jalgaon, where a rolling mill is being run. A number of items of railway property were found lying in the premises. Inquiries were made with the petitioner, who is the owner of the said rolling mill, as to the said material, and his statement was recorded. The petitioner stated that, the property found by the RPF Officers had been purchased by him in an auction. The petitioner produced the documents showing how he had acquired the property. However, out of the said items of property, the petitioner could not produce any documents in respect of two rail line pieces, a narrow gauge rail line piece, a wagon couple uncouple rod and a wagon spring. These articles were totally weighing about 50 Kgs. and were valued at about Rs. 400/-. These articles were taken charge of, by holding the same to be the railway property, which was in the unlawful

possession of the petitioner. After carrying out investigation, a complaint alleging commission of an offence punishable u/s 3(a) of the RPUP Act has been filed against the petitioner and, as aforesaid, the case is pending.

The prosecution examined four witnesses before charge. The petitioner applied for discharge claiming that, no case for framing of charge had been made out. The learned Magistrate by his order dated 2nd July 2011, rejected the petitioner's application for discharge. The petitioner thereafter moved the Court of Sessions by filing an application for revision, but the Additional Sessions Judge, who heard the revision application, dismissed it.

Being aggrieved thereby, the petitioner has approached this Court, invoking its inherent powers and its jurisdiction under Article 227 of the Constitution, praying that the impugned orders be set aside, and the petitioner be discharged from the said case.

3. I have heard Mrs. Rashmi S. Kulkarni, the learned Counsel for the petitioner, and Mr. S.R. Palnitkar, the learned Additional Public Prosecutor, for the respondents - State. With the assistance of the learned Counsel for the petitioner, I have gone through the petition and the annexures thereto. I have carefully gone through the notes of evidence, as adduced before the Magistrate, copies of which are annexed to the petition.

4. It is contended by the learned Counsel for the petitioner that, in the first place, the raid and the seizure of the property in question, as effected by the officers of the RPF, was itself illegal. She submitted that the offence u/s 3(a) of the RPUP Act is non-cognizable (Section 5 of the RPUP Act). She submitted that, a special procedure for arrest of the offenders and for inquiring into the offences has been laid in the RPUP Act. She drew my attention to the provisions of Section 10 and 11 of the RPUP Act, and contended that, an officer of the RPF would not be entitled to enter in premises, or search the same and/or to take possession of any property, without a search warrant issued by a Magistrate in accordance with Section 10 of the RPUP Act.

5. Even otherwise, on merits, she submitted that, huge property was found with the petitioner, and that, he satisfactorily accounted for the possession thereof. She submitted that, only in respect of an extremely small part of the property, the petitioner could not produce any documents, but in any case, that the aforesaid articles were railway property, itself was not indicated by the evidence adduced before the Magistrate. According to her, therefore, when the basic ingredient of the alleged offence was missing in the evidence adduced before charge, the Magistrate could not have directed framing of a charge against the petitioner.

6. While exercising the writ jurisdiction, this Court would not undertake an independent re-appraisal of the evidence adduced before the trial court for examining the correctness of the finding arrived at by the trial court. However, it would be open - and necessary - for this Court to see whether the finding has

been arrived at without any evidence on any essential aspect of the matter. Such an exercise needs to be undertaken even while exercising writ jurisdiction.

7. Since the property, alleged to be railway property, of which the petitioner is alleged to be in unlawful possession, was not found in railway premises, it needs to be seen as to what was the evidence to indicate that, it is railway property, as defined under Clause (d) of Section 2 of the RPUP Act. Clause (d) defines, "Railway property" as, any goods, money or valuable security or animal, belonging to, or in the charge or possession of, a railway administration. In the instant case, there is no evidence that the said articles, namely, (a) two rail line pieces of 1 feet each in length, (b) one narrow gauge railway line piece about 3 feet in length, (c) one wagon couple and uncouple rod, and (d) one wagon spring were in possession of the railway administration, or had been held by them at any time at any particular place, and have gone missing therefrom. Therefore, how the prosecution has attempted to show that the said articles are railway property, needs to be examined.

8. The first witness Ramjilal Tomar (PW 1) is the complainant himself. In his cross examination, he has admitted that he had taken the search of the premises in question, without any search warrant. He also admitted that there were no marks of the railways on any of the said articles. He also admitted that, in the course of investigation, he could not collect any evidence as to from where the said articles had been stolen or were found missing.

9. The second witness Vijay Gonnade (PW 2) is an Engineer working in the Railways. His evidence shows that on being called by the officers from the RPF, he had gone to Jalgaon where he was shown some articles. He has stated that the coil spring shown to him, is used in secondary suspension arrangement of BOXN wagon, and that the spring shown to him was in serviceable condition. He claimed to have issued a certificate in respect of the two of the items of the aforesaid property, as railway property. In the cross examination, he admitted that none of these articles bore any identification mark of railway as "Indian Railway, Western Railway, Northern Railway, etc." In the cross examination, he further admitted that he did not have any documentary evidence to show that the articles in question are used exclusively in Railways.

10. The third witness Bhagwat Paul (PW 3) is also an Engineer working in the Railways. His evidence shows that he was called by the RPF Officers, and he was told that some property of Railways had been seized, and that he should certify the same as railway property. He was shown three rail pieces. According to him, two of them, which were described as "69 pound type" were used for broad gauge track of railway in yard area, and the third rail piece which was described as "35 pound type" was used in narrow gauge railway line. In the cross examination, he admitted that none of the said article bore any identification mark of Railway, and that except his bare words, there was no evidence with him to show that the property belongs to Railway Administration. In the examination in chief itself, he has stated that the small pieces of rail are not used in railway

line, but are used for "miscellaneous work" like stand of water tank and turn out points, etc.

11. The fourth witness Adhar Koli (PW 4) is the Investigation Officer in the matter. He also admitted that there were no identification marks on any of the articles showing it to be railway property. He also admitted that there was no evidence that the property was stolen from any particular place or was missing therefrom.

12. It is, therefore, clear that, that the articles in question are railway property is sought to be established only on the basis of opinion of Vijay Gonnade (PW 2) and Bhagwat Patil (PW 3). Ordinarily, the witnesses are to state facts and not their opinions. To this general rule, an exception has been provided by Section 45 of the Evidence Act, where an expert in his evidence can give his opinion. In the instant case, it is obvious that, that the property in question is railway property is sought to be established by the opinions of Vijay Gonnade (PW 2) and Bhagwat Patil (PW 3). Now, whether such evidence would be admissible by virtue of Section 45 of the Evidence Act, is extremely doubtful. That, a particular property is "railway property" cannot be a matter which can be decided only on the basis of the opinion held by an employee of the Railway Administration. Assuming that the identification of railway property is a science or art, still, the least that is expected before admitting the opinion of a witness on this aspect, is that such person is specially skilled in such art or science, must be indicated.

In the instant case, there is nothing to show that Vijay Gonnade (PW 2) had acquired any special skill, knowledge or training in identifying railway property. Bhagwat Patil (PW 3) does claim that he was having 19 years experience in the Department of Railway, and that he used to see the articles, such as, railway pieces, every day. In my opinion, this by itself, will not indicate him to be a person whose opinion can be received in evidence by virtue of Section 45 of the Evidence Act. Moreover, the articles in respect of which a claim of they being "railway property" is made by him, are rail line pieces, and admittedly, the pieces were around 50 years old. If pieces are removed from a railway line, the line would be damaged and such a theft or removal would not go unnoticed. In this case, there is no theft or missing report in respect of any of the articles. According to this witness, these pieces were not used as "railways", but for "miscellaneous work", like stand of water tank, etc. Such use of these articles need not be made only by Railways; and it is obvious that the invention of such use has been made only to claim that the property is "used" in Railways. In my opinion, there was absolutely no admissible evidence for establishing the property in question to be "railway property".

13. Moreover, what cannot be overlooked is that, a number of articles i.e. 195 fish plates. 9 ST sleepers of railways, etc. were found in the premises of the rolling mill. It is also not in dispute that, the possession of all these articles by the petitioner was held to be lawful. It is also not in dispute that the petitioner had purchased the same in an auction of the railway property. He had documents

to account for his possession of the property except the aforesaid items, which form a negligible and small part of the total property found with the petitioner.

14. The ingredients of the offence punishable u/s 3(a) of the RPUP Act are:

- (i) the "property" in question should be "railway property";
- (ii) it should reasonably be suspected of having stolen or unlawfully obtained; and
- (iii) it should be proved that the accused was or had been in unlawful possession of such property.

In this case, there was no evidence to indicate the property in question to be "railway property". The mere opinions expressed by Vijay Gonnade (PW 2) and Bhagwat Patil (PW 3), who are not shown to be qualified to have their opinion admitted in evidence, by virtue of Section 45 of the Evidence Act, cannot be termed as evidence. Secondly, when, admittedly, the petitioner had purchased property auctioned by the Railway Administration, and the huge railway property that was in possession of the petitioner was shown to have been acquired lawfully by him, there was hardly any occasion for suspecting that a small part thereof was stolen or had been unlawfully obtained by him.

15. In view of this, though there is substance in the contention of the learned Counsel for the petitioner that, an Officer of the RPF cannot enter, search and effect seizure of any property without a search warrant from a Magistrate, as contemplated u/s 10 of the RPUP Act, I do not wish to go into a discussion as to the effect of the apparently illegal search on the evidence obtained by such search, the same being unnecessary as the evidence adduced before the charge is, anyway lacking on the most vital aspects that are required to be established by the prosecution.

16. The Magistrate as well as the Additional Sessions Judge have rejected the plea for discharge basically on the ground that, there was evidence of the expert witnesses to show the property in question to be "railway property". Neither the Magistrate nor the Additional Sessions Judge addressed himself to the question, as to whether these witnesses could be termed, in law, as experts, and whether their opinions would be covered by the provision of Section 45 of the Evidence Act. This was necessary, particularly because there was no other circumstantial evidence in that regard, as would be available when the alleged offender is found within the railway area with the property. Further, none of them considered the effect of the undisputed circumstance ? viz.: that the petitioner was, admittedly, in lawful possession of large volume of railway property, and could not account for only an extremely small part of the property - found along with the property which was duly accounted for. Whether it was reasonable to believe that a person who purchases huge property in railway auction, would acquire property worth Rs. 400/- unlawfully and whether, therefore, the property could be "reasonably" suspected to be stolen or unlawfully obtained, needed consideration - although by taking a prima-facie view of the matter.

17. The procedure prescribed for the trial of warrant cases instituted otherwise than on Police report requires recording of evidence before charge. Though the legal position that, "at the stage of framing of charge, the court is neither expected nor permitted to meticulously evaluate the evidence adduced before it, as if it were to pronounce a judgment of acquittal or conviction", is well settled, it does not mean that the court should not even bother to see whether all the ingredients of the alleged offence are disclosed from the evidence adduced. In this case, there was no evidence with respect to the basic ingredients of the alleged offence. The parameters to be applied by a court, while considering whether to discharge an accused, or proceed further against him by framing of charge, are to be found in Section 245 of the Code of Criminal Procedure, 1973. If the prosecution fails to make out a case which, "if un-rebutted, would warrant his conviction" then, the accused shall be entitled to be discharged.

18. Certainly, no case had been made out against the petitioner which, if un-rebutted, would warrant his conviction. In the absence of evidence on the basic ingredients of the alleged offence, in the evidence adduced before charge, the order directing framing of charge must be termed as patently illegal. Such a prosecution cannot be permitted to be continued.

19. The petition is allowed. The order dated 2-7-2011, passed by the Judicial Magistrate (First Class) [Railways], Bhusawal, and the order dated 4-12-2012, passed by the Additional Sessions Judge, Jalgaon, are set aside. The petitioner stands discharged. Rule is made absolute in the above terms.