

(1951) 02 KAR CK 0004

In the Karnataka High Court

Case No : Criminal Revision Petition No. 282 of 1950-51

K. Subbaraya and Another

APPELLANT

Vs

Government of Mysore

RESPONDENT

Date of Decision : 21-02-1951

Acts Referred:

Evidence Act, 1872 — Section 106

Citation : AIR 1952 Kar 8

Hon'ble Judges : Venkata Ramaiya, J

Bench : Single Bench

Advocate : H.V. Narayana Rao, for the Appellant; A.G., for the Respondent

Judgement

1. The two petnrs. & their nephew were tried by the Special First Class Mag. Sagar, on charges framed under Clauses 3, 5 & 6, Movement of Timber (Control) Order 1948, for having transported timber from the Soppinabetta forest for being in possession of the said timber & for having established a saw-pit without a permit for any of these on 30-10-1949. The petnrs. & their nephew, the 3rd accused, were all acquitted of the charge relating to the establishment of the saw-pit without a permit but convicted for contravention of Clause 3 relating to unauthorised transport & sentenced to pay a fine of Rs. 200/-. They were also found guilty of being in possession of timber without a permit necessary under Clause 5 & sentenced to pay a fine of Rs. 50/-. On appeal the nephew was acquitted of the offences under Clauses 3 & 5 but the conviction of petnrs. under Clause 3 alone was set aside & that under Clause 5 confirmed. It is contended that this is erroneous. Clause 5 of the Order which alone is now relevant for consideration reads as follows:

"Any person who comes into possession of any timber hereafter mentioned (teak, rosewood, honne, nandi, habfeahalasu) shall within twenty-four hours of coming into such possession, furnish to the D. F. O., concerned, the particulars required of the stock of which & the manner in which he has come into such possession."

The case for the prosecution is that on 30-10-1949 timber of the total quantity of 166.51 C. Ft. was found in the house in which the petnrs. reside & that neither of the petnrs. had a permit to be in possession of the same. Since Clause 5 expressly mentions that a permit was necessary only for timber of the specified kind or class & not for all timber the order of confiscation of the entire quantity is manifestly erroneous as a large portion of it is not governed by the Clause & to that extent the judgments of the Cts. below require modification.

2. From the evidence adduced by the prosecution & the petnrs". own statements, there can be no doubt" some timber for possession of which permit was necessary but not obtained was found in the house on 30-10-1949. But this alone is not enough to justify a conviction. The prosecution has 19 establish that it was in the possession of the petnrs. & that such possession commenced more than 24 hours prior to the discovery. The learned Ses. J. has referred to cases such as Jay Mahto and Another Vs. Emperor, , to hold that mere existence of articles in a house occupied by some persons is not enough by itself to impute possession to all of them & on this view he acquitted the nephew of the petnrs. As regards the time at which petnrs. got possession of the timber lie has observed that the burden of proof lies on the petnrs. u/s 106, Evidence Act. Though it is not the practice in revn. to disturb convictions based on appreciation of evidence, when there has been a wrong approach to the case & failure to apply to 2nd petnr. the considerations on which the 3rd accused was acquitted, I think that petnrs". are entitled to seek interference by this ct. for redress. To the cases quoted by the learned Judge in support of his finding about the 3rd accused, I may add "Emperor v. Santa Singh" AIR 1944 Lah 339. That was a decision in a case under the Explosive Substances Act in which it is stated that

"Section 106, Evidence Act, applies to cases similar to the cases given in the illustrations to that section & does not affect the onus of proving the guilt of an accused. That onus rests on the prosecution & is not shifted on to the accused By reason of that section. Section 106 cannot be used to strengthen the evidence for the prosecution. The prosecution must stand or tall on the evidence adduced by it & until a "prima facie" case is established by such evidence, the onus does not shift on to the accused." It was further held in that case that "the mere proof that an incriminating article is found in premises occupied by a number of persons does not in itself establish "prima facie" the guilt of any particular person or all of them jointly. That being so they cannot be called upon after such evidence to establish their in-nocence."

According to the evidence of the prosecution witnesses, it is only the 1st petnr. who produced the key of the room in which the timber was found & it is he & he alone who pointed out the place from which the timber is said to have been brought. There is nothing to show that petnr. 2 had any hand or part in this. He pleaded not guilty & alleged that the hospital Committee was in possession of the timber. Whether it is true or not, fin inference that he was in possession of it cannot be drawn from his statement. There is thus nothing to warrant a

distinction being made between accused 2 & accused 3. When an appreciable quantity of timber was stocked in a room every man living in the house must have known it. If that alone is the test, all including the ladies & servants would be liable. I do not think that the word "possession" can have such an extended application. In view of this petnr. 2 cannot be deemed to have been in possession of the timber although it was found in the house in which he happens to be a member.

3. To justify a charge under Clause 5, it is necessary for the prosecution to make out that not merely that timber was found in the house of the petnrs. on 30-10-1949 but also that the petnrs. were in possession of it for more than 24 hours prior to it. The learned Ses. J., has observed that the evidence on this point is not clear, as according to some of the witnesses it was lying there for more than a year, some say that it was placed on the 29th & some others mentioned it to be on 30th. If it be on the 30th that the timber was kept in the room of the petnrs., they cannot be considered to have contravened the orders on that very day before the expiration of 24 hours. If, on the other hand, the version of some of the witnesses is believed, the timber must have been there even prior to the date of the Control Order, in which event also the Clause cannot apply as possession innocent & lawful at the time it came to force was not meant to be affected. A similar provision on the Silk Control Order was, in 50 Mys II C R 368 held to be inapplicable to cases in which a person was in possession of silk prior to the date of the order. The charge is not properly framed in the case as noticed by the Ses. J., as it merely states that accused were found in possession of timber on the 30th, what is forbidden is possession for more than 24 hours & since this is neither alleged nor proved satisfactorily, the conviction cannot be justified. It is a fundamental rule of Criminal Law that the burden of proof lies on the prosecution to establish the charge against the accused beyond reasonable doubt & no provision to apply a different principle to this case was referred to by the learned Advocate-General. I am unable to see how Section 106, Evidence Act can, as expressed by the learned Judge, be availed of against the accused. While no authority is cited in support of it, two cases reported in "Atygalle v. The King" AIR 1936 P C 169; & "Stephen v. The King" AIR 1936 P C 289: are against such a view & these emphasize that the law does not cast on the accused the burden of proving that no crime is committed: statement of a Judge in the charge to the jury that the burden of proving certain facts which are within special knowledge of the accused (sic) does not correctly state the law & amounts to a misdirection. The Ses. J., was wrong in making use of Section 106, Evidence Act to hold the petnrs. guilty. The absence of definite evidence on the point must if at all enure to the benefit of the accused & cannot be of help to me prosecution. The Control Order places restrictions on the rights ordinarily exercised by persons in dealing with timber & it is incumbent on the prosecution to clearly show that there has been a violation of the conditions imposed therein. The provisions have to be interpreted strictly & if possible favorably to the accused.

4. Another circumstance which has not been appreciated is that there is enough

evidence to probabalise the accused" theory of the timber being kept in the house of the petnrs. for being used to construct a hospital. The prosecution witnesses 3 & 4 as well as the defence witnesses have testified to the formation of a committee to arrange for the construction of a hospital & the timber being collected by the residents of the locality. The evidence of P.Ws. 3 & 4 cannot be rejected because it was not even alleged in the trial Ct. that they had turned hostile. P.W. 4 has stated that the room was in possession of the hospital committee, the committee had asked the neighbouring villagers to give timber free of cost to the hospital, that on the day previous to the Incident two persons brought some of the logs & put the same in the room. PW3 has also said that there was no timber at all in the room on 29-10-50 & that the room wherefrom M. O. 1 & the other timber was got was being Made use of by the hospital committee of Heggodu. D.W. 1, says that the 1st accused did not get the timber & that it belonged to the hospital committee. The evidence of the other D. Ws. also supports this version. The petnrs. disclaim any right of their own to the timber & their Counsel expressed consent to the entire quantity of timber seized in the case including that not liable to confiscation under Clause 5 of the Order being given away for the construction of the hospital. If the timber was meant for the construction of the hospital & merely placed in the house of the accused for that purpose, it cannot be said that the petnrs. were in possession under Clause 5 of the Order.

5. I, therefore, set aside the conviction & sentence of the petnrs. & acquit them. The fine, if paid, will be refunded. The timber seized in the case, however, will not be returned to them but be made available for construction of the hospital at Heggodu.

6. Conviction set aside.