

**(1960) 08 OHC CK 0017**

**In the Orissa High Court**

**Case No : Criminal Revision No. 330 of 1959**

Kanduri Kasta and Another

APPELLANT

Vs

The State

RESPONDENT

**Date of Decision : 22-08-1960**

**Acts Referred:**

Criminal Procedure Code, 1898 (CrPC) — Section 162, 439(3)

Penal Code, 1860 (IPC) — Section 379

Telegraph Wires (Unlawful Possession) Act, 1950 — Section 2, 5

**Citation : (1962) 28 CLT 185**

**Hon'ble Judges : Narasimham, C.J**

**Bench : Single Bench**

**Advocate : A. Das, for the Appellant; A.K. Tripathy, for Standing Counsel, for the Respondent**

**Final Decision : Dismissed**

## Judgement

Narasimham, C.J.—This is a petition in revision against the appellate judgment of the Sessions Judge of Cuttack, maintaining the conviction of the Petitioners u/s 379, Indian Penal Code and the sentence of one month's rigorous imprisonment and fine of Rs. 100/- on each of the two Petitioners passed by a Magistrate, III Class, Cuttack.

2. The learned Sessions Judge pointed out in his judgment that the sentence was rather lenient as the article stolen was telegraph wire belonging to the Central Government. Hence at the time of the admission of this revision petition notice was issued on the Petitioners to show cause why the sentence may not be enhanced and they were given adequate opportunities to show cause against their conviction also, and to argue the revision both on facts and on law.

3. The facts are these. As thefts of copper wires between telegraph poles along the railway line were rampant the Police had organised a patrol party to partol railway lines and telegraph poles. On 20th January 1955 Constable Nagendra Nath Roy (p.w. 8). Constable Sheikh Hussain (p.w. 6) and two Choukidars were

deputed to undertake such patrol work between the Mancheswar railway station and Bhubaneswar border. The Assistant Sub-Inspector of Police Cuttack. Sadar, named Gobind Chandra Salm (p.w. 5) had been deputed a few days earlier to check the work of the patrol party. It is said that at about 6-15 p.m. on that date he met the patrol party, divided it into two groups and directed each group to proceed on either side of the railway line to detect theft of copper wire by culprits at about 8 p.m. When Constable Nagendra Nath Ray (p.w. 8) and his party were proceeding between mile post 268/9 and mile post 268/10 they heard the sound of cutting of wires. They proceeded to a distance of about a furlong and then saw the two Petitioners, along with another person, rolling some copper wires. In the meantime p.w. 5 the Assistant Sub-Inspector had also noticed some copper wires hanging from telegraph posts between mile posts 268/9 and 268/10 and heard sounds indicating that some culprits had cut wires. He rushed immediately to the spot with torchlights and claimed to have seen the two Petitioners along with another person coiling cut copper wires. The Police party then surrounded the culprits and arrested them with the cut wires in their possession. On searching them a betel nut cracker, a knife with a batua and a Chunhai were recovered. A seizure list was prepared in due course and the arrested persons along with the seized articles were taken to Mancheswar police camp and from there a telephonic message was sent to the Sub-Inspector, Sadar, Sri Baman Chandra Biswal (p.w. 10). P.W. 10 then reached the spot, got a report in writing from the Assistant Sub-Inspector Sri Gobind Chandra Sahu (p.w. 5) and treated it as F.I.R. and investigated the case in due course. The seized copper wire was sent to the Sub-divisional Officer Telegraphs Sri T.A. Pandmanabhan (p.w. 7) for his opinion and then the Petitioners were placed on trial.

4. The two Petitioners admitted that they were arrested by the Police party while they were walking along the railway Jin on the date of occurrence, but denied having committed any theft of copper wire. Apparently their plea was they were mere innocent pedestrains who met the police petrol party and that the latter falsely charged them with having committed theft of copper wire and "planted" some copper wire on them with a view to show that they were recovered from their possession. The Petitioners also examined two defence witnesses d.ws. 1 and 2 in support of this plea.

5. As the arrest of the two Petitioners on the railway track at that hour of the night is practically unchallenged, the crucial question for consideration is whether the evidence of the Police witnesses that they actually saw the two Petitioners and a third person coiling cut copper telegraph wire, can be believed.

6. The most important witness is undoubtedly the Assistant Sub-Inspector of Police p.w. 5. He claimed to have rushed at the Petitioners while they were in a bush close to the railway track and to have actually seen them coiling copper wire. He admitted that he did not see them actually cutting the telegraph wire though he heard some cutting sound and also some cut copper wire hanging between mile-post 268/9 and mile-post 268/10. He further admitted that the

Petitioners had in their possession suitcases containing ornaments. This circumstance was relied on very much to show that the Petitioners were respectable persons who had nothing to do with the theft of the telegraph wire in question. But nothing turns on this circumstance alone, because even persons who might be outwardly respectable may sometimes engage in committing theft of copper wire which has great value in the market. Any court can take judicial notice of the fact that theft of copper wire from telegraph lines had become very rampant, especially in Bengal, Bihar, Orissa and Mysore and Parliament found it necessary to amend the Telegraph Wires (Unlawful) Possession Act, 150, by the amending Act of 1950, *Banchhanidhi Patro v. The State* Even (1959) 25 C.L.T. 254 in the old Act the burden of proof was shifted on the person accused of an offence under that Act. In the instant case, the evidence of the Assistant Sub-Inspector of Police (p.w. 5) is fully corroborated by that of Constable Nagendranath Roy (p.w. 8) who stated that he actually saw the two Petitioners and their companion rolling cut copper wire. Apart from a general suggestion that they are Police witnesses, who in their excessive zeal for detection, were ready to plant copper wire on innocent passersby nothing could possibly be urged against their testimony. The other Constable (p.w. 6 Sheikh Hussian) was also examined in the earlier stages of the trial but as he was not available for cross examination after charge, the learned Magistrate rightly rejected his testimony.

7. On behalf of the Petitioners much reliance was placed on the evidence of two of the search witnesses, namely p.w.s. 1 and 2 who stated that when they reached the spot and saw the Petitioners in the custody of the Police party the seized copper wire was with the Choukidar. This piece of evidence was relied on in support of the defence plea of "planting" of the wire by the Police party on the Petitioners. I do not think that such an inference can necessarily follow from their evidence on the other hand the Petitioners during the cross-examination of p.w. 8 brought out that after the arrest of the Petitioners with the wire in their possession, it was taken possession of by the Choukidar who was in the Police party. The two search witnesses p.w.s. 1 and 2 came to the spot a little later and they saw the copper wire in the possession of the Choukidar. Hence their evidence does not in any way discredit the evidence of the Police witnesses who were the first to see the Petitioners in the act of rolling the copper wire. Moreover the third search witness Hadu Sahu (p.w. 4) has stated that when he reached the spot the copper wire was with one of the accused persons Kanduri Kasta. It was urged that the evidence of this witness should not be believed because according to him he was in the company of p.w.s. 1 and 2 and they stated that when they reached the spot the copper wire was in the possession of the Choukidar. I see no material discrepancy between the evidence of p.w.s. 1 and 2 and that of p.w. 4. Though all the three of them were proceeding together it is not improbable that one of them viz. p.w. 4 was slightly ahead of the others and might have noticed the Petitioners in the custody of the Police a few minutes earlier than his two companions. There is no reason to disbelieve the evidence of

p.w. 4 to the effect that he saw the copper wire in the hands one of the Petitioners specially as there was no particular reason for him to depose falsely against the accused persons, whom he is not known from before.

8. The failure of the Police to examine the Choukidar who was alleged to have taken possession of the copper wire soon after the arrest of the Petitioners was also commented upon. But I do not think that any adverse inference can be drawn against the prosecution on account of this omission. The Choukidar is after all a subordinate member of the Police force and when both the Assistant Sub-Inspector (p.w. 5) and the Constable (p.w. 8) have been examined to show the circumstances under which the Petitioners were arrested, no additional strength would be given to the prosecution case by the examination of the Choukidar. Even if he had been examined, it would have been argued with considerable vehemence, on the side of the defence, that as he was a subordinate member of the Police force he was bound to support the evidence of the Assistant Sub-Inspector. The question ultimately depends on the belief or disbelief of p.w. 5 and p.w. 8; and I see no reason to differ from the finding of the two lower courts especially when the evidence of p.w. 4 against whose respectability and disinterestedness nothing has been suggested shows that when he reached the spot the copper wire was found in the possession of one of the Petitioners.

9. It was then contended by Mr. Asok Das that the prosecution has not affirmatively established that the copper wire seized by the Police (M.O.I.) was copper wire belonging to the Telegraphs Department. As stated already the wire was sent to the Sub-divisional Officer Telegraphs Sri Padmanabhan (p.w. 7) for examination. It appears that he gave a report to the Police and also appeared as a prosecution witness. His examination-in-chief shows that his report was actually produced before the Court and marked as Ext. 2. Unfortunately this exhibit is not found on the record and though, even at the stage of revision efforts were made to get at least the office copy of the report of Sri Padmanabhan it was not available. This has been taken advantage of by the Petitioners who urged that in the absence of that report it must be held that the prosecution has failed to prove that the wire seized from the Petitioners was telegraph wire. There might have been some force in this argument, but for the answers elicited from the Sub-divisional Officer himself (p.w. 7) by the Petitioners during his cross-examination. It was brought from him that the wire that was sent to him was pure copper and its gauge was about 200 lbs. per mile. Under Clause (b) of Section 2 of the Telegraph wires (Unlawful) Possession Act, 1950, copper wire having a gauge of 200 lbs. per mile is defined as "telegraph wire" and the burden is cast on the person in possession of it by lawful means. Thus from the answer brought out in cross-examination from the sub-divisional Officer himself it is well established that the copper wire that was sent to him for opinion was telegraph wire. Mr. Asok Das however contended that the further answers given by that witness in cross-examination seem to show that his opinion about the gauge of the Wire was not correct. P.W. 7 stated that the distance between two telegraph poles on the railway line would be 165 feet and

the weight of the copper wire would be about be 12? lbs. He added that the weight of the copper wire sent to him was 27 lbs. On the basis of these answers it was urged that the gauge could not be 200 lbs. per mile. But the cross examination of this witness was not further pursued to elucidate this point. Though it was the prosecution case that the telegraph wire was cut for about three span length of wire in each span was cut. On the other hand when p.w. 3 reached the spot he found some wire hanging from the poles. Hence it is not correct to say that as three span length of wire was cut, the weight of the seized wire must be c. x 12 ? lbs. or 37? lbs. The weight of 27 lbs. given by p.w. 7 was in no way inconsistent with the prosecution case. It was then urged that in view of the admission by p.w. 7 that he did not measure the length of the wire seized his opinion that its gauge was 200 lbs. per mile should not be accepted. Here again the cross examiner did not pursue the questions any further. An expert of the Telegraph Department may be able to say from the weight, appearance and other measurements such as the diameter of the wire etc. that its gauge is 200 lbs. per mile. It may be necessary for him to measure the actual length of the wire sent to him. In any case as the cross examination was not pursued I see no reason to disbelieve his evidence on the subject. In this connection, the evidence of p.w. 9 Puna Das a hne man of the Telegraph Department may also be noticed. He was sent to the spot to repair the telegraph line after the incident. It was brought out from him during cross examination that the seized wire was shown to him by the I.O. He stated that "the stolen wire was from one end to the other, near two consecutive posts". Thus, the fact that the seized wire was telegraph wire admits of no doubt. Hence the loss of the original report of p.w. 7 need not be given such importance.

10. Apart from the evidence of the Sub-divisional Officer, the place where the Petitioners were arrested and the other circumstances as admitted by the Petitioners themselves leave no room for doubt that the wire seized from them was telegraph wire. The Petitioners were admittedly arrested while they were walking on the railway track. The fact that the wires were found cut between two mile posts at that spot also admits of no doubt whatsoever. P.W. 3 stated that when he went to the spot he found cut wires hanging from mile-posts 268/9 and milepost 268/10. When it is the Petitioner's own case that the Police ?planted? the copper wire on them and charged them with unlawful possession of the same, it will be fantastic to say that after having cut the telegraph wire on the spot and collected the same the Police would ?plant? (on the Petitioners some other copper wire which is not telegraph wire) and then charge them with theft of the same. The defence should not be permitted to take advantage of the negligence shown in the Magistrate's office in c"onsequence of which the report of p.w. 7 has been lost. I should however suggest to the District Magistrate, Cuttack that a searching enquiry should be made administratively to find out the circumstances under which ext. 2 was lost from the records and suitable disciplinary action taken against the persons concerned. Perhaps some confusion was caused by marking the report of the Sub-divisional Officer (p.w. 7) as well as

the F.I.R. with the same number Ext. 2. The Trying Magistrate should have avoided this mistake.

11. I see therefore no reason to disturb the conviction of the Petitioner u/s 379, Indian Penal Code. But they should also have been prosecuted for an offence u/s 5 of the Telegraph wires (Unlawful Possession) Act 1950. The case should not also have been transferred to the file of a Third Class Magistrate.

12. I should further point out to the learned Sessions Judge and the trying magistrate that some inadmissible evidence has been brought out during the cross examination of p.w. 5. The statement made by the Petitioners Kanduri Kasta and Udayanath Padhan before the Police party were inadmissible as they would be hit by Section 162, Code of Criminal Procedure. The trial court also committed an error in allowing the following answer of p.w. 5 to be recorded:

The accused persons were suspects in a copper cutting case on previous occasions but there was no case against them.

It is true that the defence lawyer himself brought out these answers in cross examination of p.w. 5, but the court has the paramount duty to see that inadmissible evidence especially about the previous bad character of an accused in a criminal case, is not, brought out even though the defence lawyer may have overlooked the rule of evidence on the subject. The court should not have allowed that question.

13. On the question of enhancement of sentence there can be no doubt that the sentence of one month's rigorous imprisonment and fine of Rs. 100/- only on each of the Petitioners is grossly inadequate. Thefts of telegraph wire have become very rampant on account of the high price of copper and offenders should be given deterrent sentences with a view to effectively check this type of crime. Sub-section (3) of Section 439, Code of Criminal Procedure permits this Court while exercising its powers of enhancement, to pass a higher sentence than could have been legally "inflicted by the trying Magistrate.

14. While therefore maintaining the conviction of the two Petitioners u/s 379, Indian Penal Code. I enhance the sentence passed on each of them to six months rigorous imprisonment. The sentence of fine of Rs. 100/- passed on each of them will also remain; in default of payment of fine, each of them shall undergo rigorous imprisonment for one month more. The rule for enhancement of sentence is made absolute and this revision petition is dismissed.