
(1960) 08 MP CK 0063
In the Madhya Pradesh High Court
Case No : C.R. No. 538 of 1959

State	Vs	APPELLANT
Babulal		RESPONDENT

Date of Decision : 19-08-1960

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 417

Citation : (1961) JLJ 961

Hon'ble Judges : T.P. Naik, J;C.B. Kekre, J

Bench : Division Bench

Advocate : R.J. Sharma, for the Appellant; H.L. Verma, for the Respondent

Final Decision : Allowed

Judgement

T.P. Naik, J.—The respondent (accused) Babulal was prosecuted for an offence u/s 34 (a) of the Excise Act in the Court of the Magistrate, First Class, Harda, for being found in illegal possession of about 24 seers of ganja. The learned Magistrate by his judgment dated 30-9-1959 acquitted him of the offence on the ground that the prosecution evidence did not establish that the respondent was found in possession of the ganja in question nor that it was seized from his possession. The State Government has now come up in appeal u/s 417 of the Code of Criminal Procedure against the judgment of acquittal of the respondent.

2. The prosecution case was that on receipt of information that the respondent accused was to smuggle some ganja during the prohibition week, on the night of 6-10-1956, by the Calcutta Mail into Harda town, certain police constables were deputed by Sub-Inspector Shrivastava to keep watch over him and to apprehend him, if necessary. Consequently, police constable Jayendra Singh (P. W. 1) and head constable Liladhar (P. W. 2) accompanied with a few more constables and witnesses went to Harda railway-station and kept a close watch over the respondent. The respondent alighted from the Calcutta Mail and hired a coolie, Mannulal (P. W. 5), to take his luggage to the waiting room. There he waited till the train had left the station and the crowd had cleared. Thereafter, he engaged

a tonga owned by Gulab (P. W 6) and after placing his luggage, which consisted of a hold-all, a suit-case and a hand bag, thereon, proceeded to the town. On the way, at the railway-station gate, head constable Liladhar (P W. 2) came and sat in the tonga by the side of the respondent. Near Ratilal cross-roads, the respondent somehow became suspicious and wanted to run away but was detained by head constable Liladhar (P. W. 2). On a call from the head constable Liladhar (P. W. 2), other constables, who were following the tonga on bicycles, also came there. The luggage of the respondent was taken out, which on search was found to contain 24 seers, 14 chhataks and 1 tola of ganja. The hold-all and the suit-case were both found locked, and the keys of their locks were supplied by the respondent. The ganja was seized vide seizure memorandum Ex. P-2, while the personal effects of the respondent, viz., his shirts, costs, bed-sheets, etc., including some cash, were returned to him vide Ex. P-3. after his personal search.

3. The respondent abjured his guilt and pleaded that he has been falsely implicated. He filed a written statement, wherein he stated that neither the luggage seized nor the ganja found therein belonged to him; nor were they seized from his possession. He denied that he had come by the Calcutta Mail and alighted with the luggage in question at Harda railway-station According to him, on that day, he was already at Harda. In the evening, he intended to go to Khandwa by the Calcutta Mail. For that purpose he sent his servant to the railway-station to enquire about the time of the train and to purchase a second class railway ticket for Khandwa. The servant brought a ticket for him and also informed him that the train was about an hour and a half late. He, therefore, lay down to rest; and after about an hour, walked down to the railway-station as he could not find any tonga then. When he reached the third class waiting room at the railway-station, he learned that the Calcutta Mail had left about 10 or 15 minutes earlier. Consequently, he went to the booking office, surrendered his unused railway ticket and got a refund of the fare paid by him on it. While returning, he found outside the gate of the railway-station near the municipal octroi post a tonga standing. Head constable Liladhar (P. W. 2) was sitting in the rear portion of it, and there was also one more man sitting in the front of the tonga with the tongawalla. Near that man in front were also kept a hold-all and a suit-case. After enquiring from the tongawalla, he also sat with the head constable. He had then only a few clothes wrapped in a bed sheet, and no other luggage. When the tonga reached the petrol pump of Mustaq Hussain, head constable Liladhar (P. W. 2) asked the tongawalla to stop the tonga and as it stopped at the behest of the head constable, the person who was sitting in the front seat of the tonga got down and went away somewhere. The tonga then proceeded forward. At the Ratilal cross-roads, the head constable again asked the tongawalla to stop the tonga. At that time, the respondent saw that some more constables had approached the tonga. All of them caught hold of him and asked him to go to the hut of Surjitsingh. They also accused him of having kept ganja in the hold-all and the suit-case. He denied that those articles belonged to

him, but they did not listen. Thereafter, they took him to the hut of Surjitsingh. They then sent for the Sub-Inspector of Police, Shrivastava. All the police officers then searched the luggage, which was on the tonga, and prepared a seizure memorandum, which he was made to sign under threats and intimidation. The suitcase in question had no lock on it and it was opened by the head constable without the help of any key.

4. In order to prove its case, the prosecution examined the head constable, Liladhar (P. W. 2), who sat with the respondent in the tonga from the railway station to the point where the seizure was made. Jayendra Singh (P. W. 1) and Jagannath (P. W. 4) the two constables who had followed the tonga on bicycles. Mannulal (P. W. 5), the coolie who had taken out the luggage of the respondent from the railway compartment to the waiting room, Gulab (P. W. 6), the tongawalla in whose tonga the respondent had travelled with his luggage from the railway station, and Badri Prasad (P. W. 9), who was a witness to the alighting of the respondent from the train as well as to the seizure of the articles by the police, and who had also signed the seizure memorandum (Ex. P-2).

5. The acquittal of the respondent is based, inter alia, on the following findings:-

(1) That the evidence of constable Jayendra Singh (P. W. 1) and Liladhar (P W. 2), head constable, was of little value as the investigating officer had failed to record their statements u/s 161 of the Code of Criminal Procedure and had not filed in Court, either with the challan or ever, the written statements which these witnesses had submitted to him. Copies of those statements were, no doubt, supplied to the de fence, but they were inadmissible and of no use to it. The learned trying Magistrate also held that head constable Liladhar (P. W. 2) had stated in his evidence that the investigating officer had recorded his statement during investigation. This statement was missing from the record and had not been supplied to the defence. The evidence of the investigating officer to the contrary saying that he had not recorded the statement of head constable Liladhar during investigation was not believed.

(2) Rameshwar and Ramavtar, two other constables, who had been deputed to watch the movements of the respondent and who had also followed him from the railway station to the point where the seizure of ganja was made had not been examined, which gave rise to a serious adverse inference against the prosecution.

(3) The statement of constable Jagannath (P. W. 4) was also inadmissible, as during investigation his statement had not been recorded in the police case diary by the investigating officer.

(4) The testimony of Badri Prasad (P. W. 9) was of no evidentiary value and deserved to be rejected completely, as it contained many contradictions on important material particulars and also because he had told a few obvious falsehood.

(5) The evidence of the tongawalla Gulab (P W. 6), was also of not much use

because it did not establish that the luggage in his tonga belonged to or was in possession of the respondent accused. On the other hand, it suggested that the said luggage may well have been of the person who was sitting with him in front and who had very mysteriously got down on the way. This witness clearly stated that he had not seen the luggage being placed in the tonga by the respondent. He had also stated that by his side in the front portion of the tonga a constable was sitting who had alighted somewhere on the way. About this person the prosecution was completely silent, Another reason given by the trial Court for not relying on the testimony of this witness was that, according to the witness himself, he had been sent for, at the police station, the next morning to sign the seizure memorandum.

(6) The investigation in the case had been carried on in an hopeless and casual manner. No first information report had been recorded, nor did the prosecution tender any evidence regarding the exact information on the basis of which the investigation was started by the police. In the opinion of the learned Magistrate, this failure on the part of the investigating officer to start an investigation without a first information report had caused serious prejudice to the respondent in his defence,

6. In our opinion, the learned magistrate's appreciation of evidence is vitiated by a misapprehension of the legal position. The acquittal, under the circumstances of the case, has thus occasioned a miscarriage of justice.

7. Under sub-section (3) Section 161 of the Code of Criminal Procedure:

"The Police Officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement, of each such person whose statement he records.""

Under sub-section (1) of Section 162 of the Code;

"No statement made by any person to a Police Officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it."

8. In *Tilkeshwar Singh and Others Vs. The State of Bihar*, the Supreme Court pointed out that while the failure to comply with the requirements of Section 161 (3) might affect the weight to be attached to the evidence of the witnesses, it does not render it inadmissible. The evidence of the witnesses, whose statements had not been recorded by the investigating officer during investigation, was therefore not inadmissible. In AIR 1944 318 (Nagpur) at P. 319 it was observed that it was not necessary that the police should record any statements at all when making an investigation, and indeed, the law did not require any statements to be recorded by the police in an investigation, though, no doubt, departmental instructions required it in ordinary investigations. The learned trying Magistrate was, therefore clearly in error in excluding the evidence

of constable Jayandra Singh (P. W. 1), head constable Liladhar (P W, 2) and constable Jagannath (P. W. 4) from consideration. Further, though the police, during investigation ought not to make witnesses sign the statements which they make, the signing of those statements, improper though, it is does not make the statements so taken inadmissible. In the privy Council where the point arose in *Zahiruddin vs King Emperor* 74 IA 80 at P. 86. their Lordships of the judicial Committee pointed out

"It appears to their Lordships that the effect of a contravention of the Section [162 (1)] depends on the prohibition which has been contravened. If the contravention consists in the signing of a statement made to the police and reduced into writing, the evidence of the witness who signed it does not become inadmissible. There are no words either in the section or elsewhere in the statute which express or imply such a consequence. Still less can it be said that the statute has the effect of vitiating the whole proceedings when evidence is given by a witness who has signed such a statement. But the value of his evidence may be seriously impaired as a consequence of the contravention of this statutory safeguard against improper practices."

In the instant case, however, there has been no contravention either of the provisions of Section 161, or of Section 162 of the Code of Criminal Procedure. There was no contravention of Section 161. as the Section did not make it obligatory on the investigating officer to record the statements of the witnesses in question, viz., Jayendra Singh (P. W. 1), Liladhar (P. W. 2) and Jagannath (P. W. 4). There was no contravention of Section 162, first, because no statements having been recorded, the question of getting them signed did not arise and, secondly, because in taking the signed statements, neither of the provisions was in terms contravened.

9. We may also point out that the criticism of the learned Magistrate that the statement of Liladhar (P. W. 2), which was alleged to have been recorded by the investigating officer the next day had not been made available to the defence is based on his acceptance of the evidence of Liladhar in preference to that of Sub-Inspector Shrivastava. We see no reason why Sub-Inspector Shrivastava should tell a lie on the point, and it may well be that what the witness meant by the statement was the written statement which he had given to the investigating officer the next day. In any case, there is no definite evidence that any statement recorded by the investigating officer was being suppressed by him and consequently we do not consider that his testimony could be held to be suspect on that account. We may further point out that as regards the credibility of these witnesses, which may, to a certain extent, be said to have been impaired by the fact that the record of the examination by the investigating officer of the witnesses had not been kept and consequently could not be supplied to the defence, there is the fact that two of these witnesses, viz., Jayendra Sing and Liladhar had given signed statements to the investigating officer and copies of these signed statements were supplied to the counsel for defence, so that he

could not complain that he had been denied material for the cross-examination of these witnesses.

10. We are, therefore, of opinion that the evidence of these witnesses was wrongly left out of consideration by the learned Magistrate.

11. As regards the non-examination of constables Ramehswar and Ramavtar, we find no merit in the criticism that their non-examination gave rise to a serious adverse inference against the prosecution case. No doubt, it is true that all prosecution witnesses, who are necessary for the unfolding of the prosecution story ought ordinarily to be examined by the prosecution; but there is no warrant for the suggestion that the same type of evidence should unnecessarily be multiplied. In the instant case, the testimony of Jayendra Singh, Liladhar and Jagannath (P. Ws. 1, 2 and 4) was considered by the prosecution to be sufficient for the unfolding of the prosecution story and for proof of its case. Under the circumstances, we do not see how the non-examination of Rameshwar and Ramavtar could be said to have in any way prejudiced the respondent.

12. Now, reading the evidence of Jayendra Singh (P. W. 1), Liladhar (P. W. 2) and Jagannath (P. W. 4), we find nothing in their evidence which could cast a suspicion on their testimony. On the other hand, their testimony finds ample corroboration from the evidence of Mannulal (P. W. 5), the coolie who took the luggage of the respondent from the train to the waiting room, and Gulab (P. W. 6), the tongawalla who drove him in his tonga from the railway station to the town. We say nothing as regards the evidence of Badri Prasad, whose evidence the learned trying Magistrate found discrepant, contradictory and unreliable, and which for that reason we have left out of account in considering the guilt of the respondent. The evidence of the police constables is that on information received by them that the respondent was to smuggle ganga by a train that night, they went to the railway-station where they found the respondent alighting from the Calcutta Mail and thereafter going with his luggage to the waiting room. In this they are corroborated by the testimony of Mannulal (P. W. 5), the coolie, who definitely stated that he was present at the railway-station when the respondent alighted from the Calcutta Mail on the night in question, that he knew the respondent, and that it was he who had taken out of the compartment the suitcase, the hold-all and the hand-bag belonging to the respondent, and had thereafter carried them to the waiting room. He further stated that after keeping the luggage in the waiting room, he went away, but by the time he came back to take the luggage to the tonga-stand, the respondent had already left the waiting room. He however, met the respondent 15 days afterwards when he was paid four annas as his coolie charge. He identified the luggage in the Court as the luggage which he had taken out of the compartment.

13. The evidence of the police-constable witnesses further discloses that the respondent had taken the luggage in question from the waiting room to the tonga of Gulab (P. W. 6). In this they are corroborated by the evidence of Gulab (P. W. 6), who stated that it was the respondent who first came and engaged the

tonga. After that he (Gulab) went to purchase bidis. When he returned after purchasing bidis, he found some luggage in the tonga. The luggage was a suitcase, a hold-all and a hand-bag. The first two articles were kept in the front portion of the tonga, while the hand-bag had been kept with himself by the respondent. The respondent then sat in the tonga at the back seat and the witness drove it towards the town. It may here be mentioned that from this evidence there can be no doubt that the luggage in the tonga belonged to the respondent as he was at the time the sole occupant of the tonga besides the tonga driver. The witness further stated that he also inferred that the luggage was of the respondent from the fact that it was he who had engaged the tonga. It is further significant that at the municipal octroi post, the tongawalla told the octroi moharrir that the suitcase and the hold-all belonged to the respondent and at that answer the respondent made no protest. On the other hand, the respondent even told the octroi moharrir () that he had nothing to declare (). From these circumstances it can reasonably be inferred that the luggage was of the respondent-accused. It is, no doubt, true that Gulab (P. W. 6) has introduced a story that a policeman had come and sat in the tonga at the railway gate. But he does not say that he came with any luggage, and we find no reasonable basis for holding that the luggage in the tonga belonged to that constable. Thereafter he says that after he had gone a little distance, another policeman this time the head constable Liladhar came and sat in the tonga. The learned trying Magistrate has made much of the fact that the prosecution evidence does not disclose who that policeman was who sat in the tonga, besides the head constable Liladhar. Be that as it may, we do not find that any point can be made in favour of the respondent on account of this discrepancy in the prosecution evidence.

14. Another important circumstance on which the testimony of the head constable Liladhar is corroborated by the tongawalla Gulab (P. W. 6) is that on the way in front of the Mustaq Ali Petrol pump the respondent wanted to escape and had to be detained by the head constable Liladhar (P. W. 2). This conduct of the respondent further incriminates him in the offence with which he had been charged. Then, there is the fact that the hold-all and the suitcase were both found to be locked and the keys with which they were opened were admittedly found in the tonga. No doubt, there is some discrepancy as to whether the keys were handed over by the respondent after taking them out from the pocket of his trousers or they were found in the tonga. The respondent says that they were found in the tonga and were brought from there by the tongawalla Gulab (P. W. 6). Even if we accepted that the keys were found in the tonga and those keys fitted the locks of the hold-all and the suitcase, we have no hesitation in holding that the keys must have been left over there by the respondent, because there was no other occupant in the tonga who could have left them there. From the evidence of the constables and Gulab (P. W. 6), the tongawalla. It is thus amply clear that, besides the respondent, there was no other occupant in the tonga who could have had the keys of the suitcase and the hold-all.

15. As regards the criticism that the failure of the Police to record a first

information report before proceeding to apprehend the accused had prejudiced him, we have not been able to ascertain what the prejudice was. At best a first information report can only be used to contradict its maker and we do not see how the disclosure of the police informer, who had first informed them that the accused was coming that night by the Calcutta Mail with unlicensed ganja in his possession would have helped the defence. What we are concerned with is the existence of unimpeachable evidence which could bring to us conviction of the fact that the accused was in possession of the ganja in question. How the Police came to know of it or who their informer was, was of no consequence to us. This criticism of the learned trial Magistrate, thus, further demonstrates how he allowed himself to be influenced by considerations which were not at all germane for the proper decision of the case.

16. Having carefully considered the evidence in this case we have come to the conclusion that from the evidence on record the only reasonable inference that can be drawn is that the hold-all, the suit-case and the hand-bag belonged to the respondent-accused, and as the ganja in question was seized from those articles, it was the respondent, and the respondent alone, who must be held to be in unexplained possession of the ganja. We are conscious that this is an appeal against acquittal and consequently we ought not to interfere unless there are strong and compelling reasons for so doing. In our opinion, there are very strong reasons for interfering with the judgment of acquittal in this case, because the evidence of Jayendra Singh (P. W. 1), Liladhar (P. W. 2) and Jagannath (P. W. 5) has not been considered by the trying Magistrate at all. The omission to consider this important evidence, in our opinion, completely vitiates his findings. We therefore, after having very carefully considered the evidence, on record, have come to the conclusion that it must be held that the respondent was found in unexplained possession of the ganja in question; and he is, therefore, guilty of an offence punishable u/s 34 (a) of the Excise Act.

17. As regards the sentence, in view of the fact that the respondent is a previous convict, in our opinion, a sentence of rigorous imprisonment for a period of one year would amply meet the ends of justice.

18. We accordingly allow the appeal and set aside the judgment of acquittal of the respondent. The respondent is hereby convicted of an offence punishable u/s 34 (a) of the Excise Act and sentenced to undergo rigorous imprisonment for a period of one year.