
(1954) 05 BOM CK 0001
In the Bombay High Court

State Govt.

APPELLANT

Vs

Chhotelal Mohanlal and Another

RESPONDENT

Date of Decision : 11-05-1954

Acts Referred:

Penal Code, 1860 (IPC) — Section 109, 379

Citation : (1955) CriLJ 586

Hon'ble Judges : Tambe, J; Bhutt, J

Bench : Division Bench

Judgement

1. This judgment shall also govern the disposal of criminal revisions Nos. 544 and 545 of 1953.

2. This appeal and the two revisions arise out of the judgment of the Sessions Judge, Nimar, delivered on 31-7-1953. The facts relevant for purposes of this appeal and the revisions are as under :

Prosecution case is that on 28-7-1951 Krishna-deo as guard and brakesman Gorelal started by the down goods train 565 at 19.00 hours from Bhusawal to Khandwa. On the engine of the same train, driver D. V. Duncan was on duty with, his staff of Trimbak "agwala" and fireman George Rommen. Accused Gerald Manning also got un-authorizedly on the engine of the same train and came to Burhanpur. The train remained at Burhanpur railway station from 20.15 hours to 02.30 hours. During this interval, all the accused persons collected at Burhanpur railway station and held a common consultation and broke the seal and the revetting of the wagon No. GIP 5018 in Burhanpur yard and even before the train started accused Manning, Sheman (absconding) and Chhotelal got in that wagon and at mile No. 313, between posts Nos. 4 to 9, dropped five bales of cotton cloth. Accused Duncan, the driver, slowed down the train during this interval in order to enable them to commit the crime.

Afterwards, accused Manning came to the city and recovered Rs. 400 from Mangilal. Later on, accused persons Chhotelal and Heerachand hid the stolen

property in the bushes near the rivulet in the jungle. During the course of investigation these two accused persons admitted the offence as per memorandum of admission and got the stolen property duly recovered in hidden condition as per seizure memo in the presence of the witnesses. On full investigation an offence u/s 379, Penal Code, is proved against the accused persons.

3. In the trial Court accused Duncan, Manning, Chhotelal, Heerachand and Mangilal were challenged. It was stated that accused Sheman was absconding. Accused Mangilal was discharged. Charges u/s 379, Penal Code, were framed against all the four accused. They pleaded not guilty. The trial Court held that accused Manning, Chhotelal and Heerachand were guilty of an offence u/s 379, Penal Code, and accused Duncan was guilty of abetting an offence of theft u/s 379/109, Penal Code. All the four accused persons were sentenced to suffer rigorous imprisonment for a period of two years each. All of them filed an appeal before the Sessions Judge, Nimar.

4. Accused Chhotelal and Heerachand filed an appeal separately which was appeal No. 38 of 1953. Manning filed a separate appeal which, was appeal No. 39 of 1953. Duncan's appeal was appeal No. 40 of 1953. All the three appeals were heard together by the Sessions Judge. The learned Sessions Judge maintained the conviction and sentences of accused Duncan and Manning, but acquitted Chhotelal and Heerachand. The State Government has filed an appeal against the acquittal of Chhotelal and Heerachand which is criminal appeal No. 27 of 1954. Accused Duncan and Manning have filed criminal revisions Nos. 544 and 545 of 1953 respectively against the judgment of the Sessions Judge.

5. We will take up the State Government's appeal against Chhotelal and Heerachand first.

The fact that five bales were stolen from this train is not in dispute in this case. The only question is whether the respondents were in any way concerned with the alleged theft. In this connection the only piece of evidence, which according to the appellant is against them, is the discovery made by them of these five bales. The appellant is relying on the following evidence:

(i) Exhibits P. 25 and P. 20 are the statements alleged to have been made by respondents Chhotelal and Heerachand respectively which have led to the discovery,

(ii) Exhibits P-9 and P-10 are the seizure memos of the two bales alleged to have been discovered by Heerachand & Exhibit P-11 is the seizure memo of three bales alleged to have been discovered by Chhotelal, and

(iii) the evidence of P. Ws. 6, 14 and 15 who are the witnesses of the alleged statements and the discovery.

6. Relying on this evidence the trial Court held that the two respondents were guilty of an offence u/s 379, IPC. The appellate Court has believed this evidence

and has held that the discovery was made voluntarily by these two respondents but has acquitted the respondents on the ground that the statements made by them which have led to the discovery were made by both of them jointly. According to the appellate Court, it has not been established as to who made the statement first and that the evidence shows that the discovery was made on account of the joint statement or on account of the accused persons jointly pointing out the places where the property was hidden by them. Such information from the respondents cannot be used against any of the accused persons. According to the appellate Court, the statement contemplated by the provisions of Section 27, Evidence Act, is the statement of "a person" and not statement of more than one person. Furthermore, according to the provisions of Section 27, if the police had information from one person and if the same information is given again by another person subsequently, the latter statement cannot be used in evidence at all.

7. The learned Counsel for the appellant contends that the statements made in this case are not the joint statements of the respondents. The statement of respondent Heerachand has distinctly led to the discovery of two bales and the statement of respondent Chhotelal has led to the discovery of three bales. These are not joint statements but are distinct and separate statements and can be used against the accused and a conviction can be based on these statements.

8. It is contended by the learned Counsel for the respondents that on a proper scrutiny of the evidence it will be found that the statements are not separate and distinct statements but are joint statements. The prosecution has failed to establish, as to which of these persons has given the information to the police first.

9. The points for determination in this appeal therefore are;

(i) Are the statements made by respondents joint statements or are they distinct and separate statements?

(ii) Are joint statements of the accused persons leading to discovery not admissible in evidence?

(iii) Assuming these statements are admissible in evidence as alleged by the prosecution, can inference of guilt u/s 379, IPC, be drawn against the respondents?

10. Point No. (i)- The statement alleged to have been made by respondent Chhotelal is as under:

I and Hirachand have kept (them) hidden at mile No. 313 in the jungle near the railway line - 3 bales in the nala and 2 bales in the bushes. I can go and point out them. Hirachand Teli and I together have concealed the bales for which I shall go and point out (Exhibit P. 25).

The statement alleged to have been made by respondent Hirachand is:

All these 5 bales were kept hidden on the same day in the night before sun-rise. I am prepared to go and point. (I) may be excused (Exhibit P. 26).

11. P.W. 8 Raghubeersingh who was present at the time the statements were made deposed:

The three accused mentioned by me above (the witness is referring to Heerachand, Chhotelal and Mangilal), were also there present. The police enquired from these three accused about the cotton cloth bales which were stolen from the running train. On being questioned the accused Heerachand had volunteered to point out the cloth bales. The statement about this was recorded by the S. I. in my presence. "Similarly" the accused Chhotelal had also agreed to point out the cloth bales and hence his statement was also recorded to this effect by the S. I. in my presence.

The two accused then agreed to take the police party to the spot to point out the cloth bales. Accordingly the two accused then led the police party to the spot. The S. I. Railway Police along with his assistants, myself, Mai Babu were then taken by these accused persons to the spot. We all had gone to the spot by the goods train by getting into the brakes van of the train. The accused were told by the S. I. that the train would be stopped "whenever they" tell us to do so for the purposes of pointing the spot according to them. Accordingly when the train was in motion and when we were near the mile number 313, the accused Heerachand asked the S. I. to stop the train. Accordingly the train was stopped there when we approached that mile post.

We all then got down at that place when the train was stopped. The accused Heerachand then led us to the spot by going ahead in the direction where he wanted to take us. He then took...a distance of about 30 to 40 paces from the railway lines. The accused Heerachand then led us to a "Heever" tree. The tree is surrounded by bushes (creepers). The accused Heerachand then took out one cloth bale from those bushes by pushing the same out of the bush. We all then scrutinised the bale so produced by the accused Heerachand. The description of the bale was then detailed by the S. I. in the seizure memo under which he seized the bale.

The bale was seized under memo Exhibit P-9 which is signed by me as an attesting witness. The same is also signed by the accused Heerachand in my presence. The cloth bale Article A is the bale produced by the accused Heerachand from the bush. I can identify it because of the tar marks thereon.

The accused Heerachand then led us to other spot at some distance away from the tree. He then took us by the side of the "Nala" about thirty paces from the tree. The accused Heerachand then took out another bale from the bushes near the mala. Article B is the bale taken out by the accused from the nala. A description about the bale so produced by the accused Heerachand was then recorded by the S. I. in the seizure memo under which it was then seized by him. The bale Article B was then seized under memo Exhibit P-10 which is signed by

me as a witness. The same is also signed by the accused in my presence.

The accused Chhotelal then took us some distance away from the Nala for showing the other bales for which he was questioned. The accused Chhotelal then produced three cloth bales from the bushes which were at a distance of about 20 paces from the nala. The two bales were produced from one place and the third one was lying close to those two bales.

12. P.W. 14 Premshankar deposed as under :

I then further observed that the two accused (the witness is referring to Heerachand and Chhotelal) were being questioned by the S. I. G. R. P. They were being questioned over the loss of ,gave bales of cloth. In the course of the enquiry, "the two accused" Heerachand and Chhotelal had told the police that "they knew the whereabouts" of the cloth bales. "The two accused" then volunteered to show the cloth bales to the police.

This witness further corroborates the story of Raghubeersingh (P.W. 8) regarding the going by train to the spot and the taking out of bales by Heerachand and Chhotelal, but he does not remember at whose instance the train was stopped.

13. P.W. 15 Tiwari, Sub-Inspector, deposed as under :

In the course of the enquiry from the accused Chhotelal, the accused Chhotelal agreed to point out to me the cotton bales by taking me to the place between Burhanpur and Chandnl. The statement of the accused Chhotelal leading the fact of undertaking to show the property-was recorded by me in the presence of the witnesses. The portion marked "A" in Exhibit P-25 is the statement to that effect. "Similarly" the accused Heerachand had also agreed to show the property namely the cloth bales. His statement to the fact of pointing out the property was also then recorded in the presence of the witness, The portion marked "A" in Exhibit P-20 is the statement so recorded by me.

This witness also further corroborates the story of Raghubeersingh (P.W. 6) about going to the spot and stopping of the train. But according to him the train was stopped at the instance of Chhotelal.

14. A scrutiny of the aforesaid evidence will show that the information given by both the respondents was simultaneous. Raghubeersingh (P.W. 6) is deposing that Heerachand's statement was recorded first, while the Sub-Inspector says that Chhotelal gave information first. But even according to the statement of the Sub-Inspector, Heerachand had also agreed to show the property. Thus it will be seen that the giving of information by these respondents and the recording of their statements is one transaction, that is, the statements made by these persons were Joint statements and not distinct and separate.

15. On this evidence, It is not established as to which of the two persons made the statement first. No doubt, at the spot the two bales were pointed out first by Heerachand and then three bales were pointed out by Chhotelal. But it cannot be

said that the discovery made by Heerachand or that the discovery made by Chhotelal was consequent upon the statement made by him. As would be seen from the portions of the depositions quoted above, both the respondents knew the place where all the five bales were hidden, and in fact had made the statements to the police that they will point out the place where all these five bales were hidden.

16. Thus it will be seen that the contention of the learned Counsel for the appellant that in this case there are distinct and separate statements made by the two respondents cannot be accepted.

17. To our mind it appears that the Sub-Inspector has made Heerachand to discover two bags and Chhotelal to discover three bags, not because Heerachand or Chhotelal was individually not in a position to discover all the five bags; but to establish the fact that both the accused persons knew the places where the bales were kept.

18. Our conclusions therefore are that there is no satisfactory evidence to show as to who made the statement first. The discoveries made were on account of the simultaneous statements and information given by both the respondents, but the facts discovered by each of the accused affords guarantee about the truthfulness of the statement of each of the accused.

19. Point No. (ii) : The next question is whether the simultaneous statements can be used against either of the accused. The learned Counsel for the respondents contends that such a joint statement cannot be used against any of the accused. Reliance is placed on cases reported In - "Kudaon v. Emperor" AIR 1925 Nag 407 (A); - "Emperor v. Yeshaba" AIR 1938 Bom 463 (B); - Poshaki and Another Vs. State, .

20. It is not possible to accept this contention of the counsel for the respondents. We are of the view that the joint or simultaneous statements of the accused persons are not inadmissible in evidence. In our opinion, the scheme of Section 27 Evidence Act, is, to put it in the words of their Lordships of the Privy Council in a case reported in - "Pulukuri Kottaya v. Emperor AIR 1947 Pc 67 (E).

The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be proved to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence.

That is to say, the information received from the first source is admissible in evidence if it leads to a discovery consequent upon that information against that source when by the fact discovered some guarantee is afforded that the

information supplied by the accused is true. Once that information is in the possession of a Police Officer and the fact is discovered by police thereby any subsequent similar information received by the police officer cannot be said to be such information as leading to the discovery of the same fact. There cannot be rediscovery of the same fact.

21. The first source in our view need not be confined to any one person. We are not in agreement with the view that the words "a person" in Section 27, Evidence Act in any way excludes admission of information from more than one person simultaneously received provided it fulfils the requirements of 6. 27. Section 13(2), General Clauses Act, provides that words in the singular shall include the plural and "vice versa" provided there is nothing repugnant in the subject or context, in our opinion there is nothing repugnant in the provisions of Section 27 for acceptance of statements jointly made by more than one person provided that facts discovered in consequence thereof afford some guarantee about truthfulness of their statements. It will depend on the facts of each case.

22. In cases reported in "Kudaon v. Emperor (A)"; "Emperor v. Yeshaba (BV and "Foshaki v. State (D) (supra)", the principle laid down is that there cannot be rediscovery of the fact already discovered. Such is not the case here. Facts discovered by each of the accused are distinct and separate.

23. The case reported in "Puttu v. Emperor (O (supra))", no doubt supports the contention of the respondents. But as stated above we are in respectful disagreement with this view. On the other hand, the view taken in - "Abdul Kadar v. Emperor" AIR 1946 Cal 452 (F), is to the contrary. Their Lordships observed :

If, of course, the prosecution are in a position to establish that the statements or the action which led to the discovery were actually made, or took place, simultaneously we do not think that evidence in regard to the simultaneous statements or the simultaneous action would be entirely shut out by the provisions of Section 27, Evidence Act, but there must be clear and satisfying evidence on this point such as will enable the Court to decide and to give a specific direction to the jury whether the evidence is admissible against both of the accused or against either and if so against which (p. 456)

24. In Lachman Singh and Others Vs. The State, , their Lordships of" the Supreme Court, touching the question of simultaneous, statements, observed as below :

The learned Counsel for the appellants cite a number of rulings in which Section 27 has been construed to mean that it is only the information which is first given that is admissible and once a fact has been discovered in consequence of information received from a person accused of an offence, it cannot be said to be rediscovered in consequence of information received from another accused person. It was urged before us that the prosecution was bound to adduce evidence to prove as to which of the three accused gave the information first. The head constable, who recorded the statements of the three accused, has not

stated which of them gave the information first to him but Bahadur Singh, one of the witnesses who attested the recovery memos, was specifically asked in cross-examination about it and stated "I cannot say from whom information was got first". In the circumstances, it was contended that since it cannot be ascertained which of the accused first gave the information, the alleged discoveries cannot be proved against any of the accused persons.

It seems to us that if the evidence adduced by the prosecution is found to be open to suspicion and it appears that the police have deliberately attributed similar confessional statements relating to facts discovered to different accused persons, in order to create evidence against all of them, the case undoubtedly demands a most cautious approach. But, as to what should be the rule when there is clear and unimpeachable evidence as to independent and authentic statements of the nature referred to in 8. 27, Evidence Act, having been made by several accused persons, either simultaneously or otherwise, all that we wish to say is that as at present advised we are inclined to think that some of the cases relied upon by the learned, counsel for the appellants have perhaps gone farther than is warranted by the language of Section 27, and it may be that on a suitable occasion in future those cases may have to be reviewed." (pp. 169-170).

It, therefore, appears that simultaneous statements are not "per se inadmissible" in evidence and are liable to be considered if the discovery made in consequence thereof affords a guarantee about the truth of the statements.

25. The facts of this case are that both the respondents simultaneously told the police that they would point out the places where the five bales were concealed. They together took the party to the place. Facts to be discovered consequent on the statements were the places where these bales were placed. Two places were pointed out by Heerachand and one place by Chhotelal. Pointing out of, these different places by these different accused persons affords some guarantee about the truthfulness of their statements.

26. In view of our findings above, we are of the opinion that the respective statement made by each of the respondents in this case is admissible in evidence against him. ,

27. Point No. (iii): The question now arises is : can an inference of guilt be drawn on account of these statements against the respondents? We are of opinion that in the instant case no inference of guilt can be drawn. The places from which the property was discovered is an open land not in possession of anybody as such. No doubt, the property was concealed under some trees and bushes. The respondents, however, are coolies and may have occasions to go deep in the country side either for purposes of easing, cutting fuel or otherwise. While on such excursions they could discover the bales. In such circumstances and in the absence of any other incriminating factors, mere discovery of the articles would not raise a presumption u/s 114, illustration (a), Evidence Act, either of theft or of receipt of stolen property by the respondents knowing it to be such.

28. In - AIR 1934 54 (Nagpur) , it was observed by Subhedar a. j. c. :

When the only incriminating circumstance against an accused is that his information led to the discovery of stolen property from places not belonging to him he could not be convicted either of being a thief or a receiver of stolen property.

We are in respectful agreement with these observations. In the light of what has been discussed above, we are of opinion that the prosecution has failed to bring home the guilt to these respondents. The appeal of the State Government is hereby dismissed.

29. We shall now proceed to consider the revision filed by accused G. Manning. This accused is convicted on the strength of the following facts found:

(i) Manning travelled unauthorisedly on the engine along with the driver Duncan from Bhusawal to Burhanpur,

(ii) On reaching Burhanpur he enquired from the guard as to how long the train will stop there for shunting operations, and for how long the guard was in service.

(iii) The guard saw this accused and the driver Duncan near the wagon at Burhanpur station,

(iv) The accused was not seen after the train left Burhanpur,

30. The learned Counsel for the applicant contends :

(i) That the evidence on record regarding the identification of this accused is not satisfactory, and the finding of both the Courts below that he travelled on the engine is unwarranted on the evidence on record, and

(ii) at any rate, even assuming these findings to be correct, the inference of guilt drawn against this accused from these findings is unwarranted.

31. In our opinion, these contentions are well founded. As would be seen from the discussion above the people who travelled on the train were the guard Krishnadeo (P.W. 5), the driver Duncan, the fireman George Rommen, P.W. 9 Trimbak "agwala" and one brakesman. The police had held an identification parade in jail to which it appears none was taken except the guard P.W. 5. When examined in Court, the guard deposed that he could not identify Manning at the time of the identification parade. It is strange that he identified him in Court. No other person was taken to the jail at the time of this parade. Trimbak (P.W. 9) no doubt identified him in Court. But identification in Court will be easy. There were only two Anglo-Indians accused in this case one of which is the driver Duncan and the other is the present applicant. The driver was well known to this witness. The only other person in the dock could be no one but the present applicant. In our opinion, the identity of accused Manning as the person who travelled on the engine on the date of the incident is not, in the circumstances, satisfactorily established.

32. The evidence of the guard is that after he had seen this applicant and Duncan near the wagon he again had checked that all the wagons were properly sealed. There is no evidence that subsequent to that this accused was seen anywhere near the wagon or near the train. Therefore this piece of evidence also is of not much value. The fact that he was not seen after the train left Burhanpur is not enough to raise the necessary adverse inference against him, in the absence of any evidence that he was to travel beyond Burhanpur. Similarly, the alleged inquiry by him from Krishnadeo, the guard, about the time that may be required for shunting and length of his service can be only a casual inquiry.

33. Even assuming that this accused travelled in that train on that day and that all the aforesaid circumstances held to have been established by the appellate Court are taken as proved, in our opinion, though they may raise suspicion in the mind are not enough to raise the inference that the applicant tampered with the seal and the rivets of the wagon after the inspection by the guard and then effected his entry into the wagon and to convict him of the offence of theft. We therefore allow his revision and order that the conviction of the applicant Manning u/s 379, Penal Code, and the sentence of two years rigorous imprisonment awarded to him are hereby set aside and he be set at liberty forthwith. The bail bond executed by him is hereby cancelled.

34. We now proceed to consider the revision of applicant Duncan. He is charged with an. offence u/s 379, Penal Code, read with Section 109, Penal Code. The facts found against him on which the conviction is based are as follows:

- (i) he unauthorizedly allowed Manning to travel with him on the train,
- (ii) at Burhanpur he and Manning inquired" about the time that may be required for completing the shunting,
- (iii) at Burhanpur railway station he and Manning were seen near the wagon,
- (iv) that he delayed the train for over two hours at Burhanpur railway station and did not start it in spite of lowering down of the signal twice for the train to start, and
- (v) he slowed down the train near about the spot in order to facilitate the throwing of the bales from the train.

35. The learned Counsel for the applicant contends :

- (i) that the evidence on record does not justify the findings of the Courts below,
- (ii) that the facts found against the applicant do not find place in the contemporaneous record which is kept by the guard, Exhibit P-8 in the case, and
- (iii) that the slowing down of the train was not intentional but that the evidence shows that it was most natural on account of the gradient at that spot.

36. The learned Counsel for the applicant emphasizes that Exhibit P-8, the guard's journal on record, is the contemporaneous record of facts. It does not

make any mention that any person "had travelled on the engine unauthorizedly or that the train was delayed for over two hours at the Burhanpur railway station due to the fault of the driver Duncan or that the train had slowed down after starting from the Burhanpur railway station. Therefore, the evidence of witnesses regarding these facts could not be accepted. Our attention has been drawn to the various rules in respect of the duties of the guard, the driver, the station-master etc. We are not concerned here as to whether these rules were observed by these officers or not. We are concerned in the instant case with the evidence on record and as to whether it establishes the guilt of the accused.

37. As already held by us in discussing the case of Manning, it is not satisfactorily established that accused Manning travelled on the train as we are not satisfied about the identity of that man. We have also discussed items (i) to (iii) in discussing the case of Manning. In our opinion, even if it is assumed that these facts are established, they are not sufficient to raise an inference of guilt.

38. So far as delaying the train for over two hours at the Burhanpur station and not starting it in spite of two signals is concerned, it is pertinent to note that Exhibit P-8, the guard's journal, does not mention that this delay was on account of any fault of the officers of the engine department. It is incumbent on the guard to note in this Journal the time lost and time gained by the loco. On the other hand, the time lost at the Burhanpur station is debited to traffic. The accused in his examination has given explanation that he was doing loco work when the signal was first lowered down and on the second occasion the guard was not in the brakevan and therefore he could not move. This is a possible explanation, especially when no mention is made about the loss of time in Exhibit P-8 being due to the fault of the driver.

39. Evidence of the guard is to be accepted with caution. The guard is the person who was in charge of the train and knowing that theft had occurred, he would be anxious to throw the blame on the driver. Trimbak (P.W. 9) deposes that the applicant performed shunting operations. After completing them he left the engine but returned to it within half an hour. Thereafter two trains were given precedence before signals were given to their train. When signals were given, accused was not on the train; he therefore whistled and the accused returned to the engine and started the train. This does not show that much time was lost in starting the train after signals were given or that the accused deliberately delayed starting or was absent from the engine for any appreciable length of time after signals were given. The station-master, Burhanpur, is not examined as a witness in the case. In our opinion, it is not established that the applicant was in any way responsible for the stopping of the train at Burhanpur. The inference drawn by the learned appellate judge that when the signals were lowered, the applicant was either helping Manning to manipulate the door of the wagon or had absented himself to allow sufficient time to Manning to do so is unwarranted on the evidence in this case.

40. The other circumstance taken into consideration by the trial Court in holding

the accused guilty that he slowed down the train intentionally also does not appear to be satisfactorily established. Exhibit P-8 does not make any mention that the train was slowed down after it had left Burhanpur railway station. It further shows that the train reached Chandani railway station within the normal running. No doubt, the guard Krishnadeo (P.W. 5) mentions that the train was slowed down for three to four minutes and Trimbak (P, W. 9) "agwala" says that it was slowed down for a couple of minutes. The evidence of Trimbak shows that the spot at which the train was slowed down is a place where trains normally slow down. He deposes :

There is gate ahead from the place where the train had slowed down. The way towards the gate and thereafter is an upgradient and is a curve. The drivers are expected to slow down there "oy way of caution."

41. This evidence of Trimbak (P.W. 9) establishes that the slowing down of the train was not in any way intentional but was in the usual course of cautious driving. The learned Sessions Judge has not properly appreciated the significance of this statement of Trimbak. The learned appellate judge has relied on his spot inspection note to hold that the curve and upgradient were insignificant and it was not necessary for the train to slow down. In our view, the learned appellate judge erred in basing his conclusion on what he experienced in travelling in a mixed parcel train. Spot inspection note is not evidence, in a case. It can be used only to appreciate evidence. It cannot take place of evidence. If the learned judge had any doubt on the point it should have called for additional evidence and not based his conclusion on what he observed and experienced in travelling over the tract in a mixed train. The inspection note shows that there is gradual curve up to mile post 313/3 and there is a level crossing gate at a distance of a mile therefrom. To decide whether it is necessary to slow down the train by way of cautious driving or not, a judge of a Court can hardly be called a competent person. Simply because the mixed train in which the learned judge travelled did not slow down at the spot, can afford no guide to decide whether it is necessary for a heavily loaded goods train to slow down or not.

42. In the instant case the train which the applicant was driving was a goods-train consisting of 30 wagons and must have been a very heavily loaded train. May be that some drivers may not slow down the train; or may be that a lighter train may not require slowing down; but it does not mean that a driver by way of cautious driving could not slow down the train. In our view, the evidence of Trimbak (P.W. 9) shows that the slowing down of the train at this particular spot is a usual thing and it will not necessarily raise an inference that the train was purposely slowed down by the applicant in order to facilitate the commission of the crime. In spite of slowing down, the evidence is that the train reached Chandani in normal time. This circumstance goes to show that this slowing down was in normal course, in the absence of evidence that the train was later on speeded up. It may be that some miscreants, knowing that the train at this spot was likely to slow down, have taken advantage thereof in committing this crime.

43. Krishnadeo (P.W. 5) deposes that though lie did not mention the slowing down of the train in the guard's Journal, he had mentioned about the same in the driver's ticket which was given to the driver Duncan. The driver's ticket is not produced in this case. No doubt, there is evidence that on reaching Chandni when the theft was discovered, this witness stated to the station-master Chandni that the train had slowed down during its journey from Burhanpiir to Chandni. As stated above, much reliance cannot be placed on the statements made by him after the discovery of the theft. This witness is likely to throw blame on others in order to avoid suspicion clinging to him. In our view, the evidence on record does not satisfactorily establish that the applicant slowed down the train intentionally.

44. No doubt, the circumstances In this case raise a grave suspicion about the guilt of the accused, but, in our view, these circumstances are not free from doubt and the guilt of the accused is not brought home to him beyond all reasonable doubt. It is unfortunate that a serious crime like this should go undetected and unpunished. That however can be no reason for convicting the applicant on the evidence tendered in this case.

45. The result is that this revision is allowed The conviction of the applicant Douglas Bruce Duncan u/s 379/109. Penal Code, and the sentence of two years rigorous Imprisonment passed against him are hereby set aside and it is ordered that he be set at liberty.