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**Court :** Karnataka

**Decided On :** Apr-20-1965

**Reported in :** AIR1967Mys47; 1967CriLJ553

**Judge :** A.R. Somnath Iyer and ;Ahmed Ali Khan, JJ.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 103, 103(1), 154, 252 and 342; Mysore Mines Act, 1906 - Sections 2(6), 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20

**Appeal No. :** Criminal Appeal No. 292 of 1964

**Appellant :** The State of Mysore

**Respondent :** Raji

**Advocate for Def. :** D. Ramaswamy Iyengar, Adv.

**Advocate for Pet/Ap. :** Bhimasenacharya Ashrit, High Court Government Pleader

**Judgement :**

**Somnath Iyer, J.**

1. This is an appeal from an order of acquittal by the State Government in a case in which the respondent who was the accused was charged with having committed an offence punishable under Sections 6 and 13 of the Mysore Mines Act (Mysore

Act IV of 1906). The accusation against him was that he was in unlawful possession of a substance described as mining sponge gold weighing a little less than five and half Tolas of the value of Rs. 673-31 when he was searched in a place near the Gandhi Statue in front of the Khadi Bhandar shop, Robertsonpet at 6-30 P.M. on September 10, 1963. The magistrate accepted the story of the prosecution that the substance which was examined by P. W. 1 an assayer attached to the Mysore Mines, was sponge gold.

Sponge gold as defined by Section 2(6) (b) of the Mysore Mines Act which will be referred to as the Act, is a mining material. Section 6 makes it an offence for a person to be in possession of any mining material without the written permission of the mining proprietor or the superintendent and when a person is unable to prove that his possession of such mining material was lawful. Section 13 prescribes the penalty which may be imposed on a person committing an offence under Section 6.

2. P. W. 7 a circle inspector attached to the detective branch of Oorgaum, gave evidence that at about 6-30 P. M. on September 10, 1963, he acquired information that the accused was on his way to his residence in Robertsonpet with mining gold. His evidence was that the accused was waylaid near the Mahatma Gandhi Statue in Robertsonpet when he arrived there ten or fifteen minutes later and that a little less than five and a half Tolas of sponge gold was produced by him from one of the pockets of his shirt. P. Ws. 2, 5 and 6 were the witnesses who were according to the witness, present when the gold was seized. Exhibit P-2 was the Mahazar prepared at 6-20 P. M. on that day in which a record was made of the seizure of the gold.

3. The effect of the evidence given by P. Ws. 5, 6 and 7 was that the gold consisted of six balls of sponge gold and some powder which were found wrapped up in pieces of news paper marked M. O. 2. After that substance was produced, M. O. 1, a white paper, was used for wrapping up that packet and in the presence of the witnesses it was sealed and a sample seal was handed over to P. W. 2.

4. The accused repudiated the prosecution story that he produced the sponge gold as alleged. His version was that on that evening he had visited his physician D. W.

1 to get his child treated and that as advised by his physician he was on his way to purchase some oranges for his child when he was stopped by the police. He stated that he did not on that occasion produce any gold and that a false case was foisted against him.

5. The magistrate was persuaded to think that the prosecution did not establish its story that any sponge gold was produced by the accused or found on his person when he was stopped near the Mahatma Gandhi Statue in Robertsonpet as stated by P. Ws. 2, 5, 6 and 7. He gave many reasons for coming to that conclusion and every one of them is assailed by Mr. Bhimsenachari Ashrit, the learned Government pleader, as founded upon either incorrect understanding of the 'law or an unreasonable assessment or the evidence.

6. The first criticism made by Mr. Ashrit was that the magistrate was not right in thinking that the witnesses who were present when the accused was stopped near the Mahatma Gandhi Statue when he is stated to have produced sponge gold from his shirt pocket, were not inhabitants of the locality in which the Mahatma Gandhi Statue was situate and that therefore there was a contravention of the provision of Sub-section (1) of Section 103 of the Code of Criminal Procedure which requires that before making a search under Chapter VII of the Code of Criminal Procedure the officer or person about to make that search shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search. Although the Magistrate did not in so many words refer to this section, it is obvious that what he was having in his mind is what the section says. The Magistrate thought that P. Ws. 2 and 5 were not inhabitants of the locality in which the accused was proposed to be searched and that therefore their evidence could not be relied upon by the prosecution in support of the theory that when the accused was stopped and he was told that he would be searched he produced the gold which was described in the evidence as M. O. 3.

7. Now the effect of the evidence given by the four witnesses P. Ws. 2, 5, 6 and 7 is that when the accused arrived near the Mahatma Gandhi Statue he was stopped and informed that he would be searched if he did not produce the gold

which he was supposed to be carrying and that the accused then produced the gold from one of his shirt pockets. The evidence of these witnesses was also to the effect that P. Ws. 2, 5 and 6 were collected by P, W. 7 by the time the accused arrived there.

Now P. W. 2 stated that he lived in Robertsonpet in which the Mahatma Gandhi Statue is situate. P. W. 5 stated that he was having some refreshments in a hotel in Robertsonpet when he was asked by P. W. 7 to attend a search although he was a resident of Champion Reef, in a house a mile distant from Mahatma Gandhi Statue. P. W. 6 was the resident of a place described as Gay Talkies Compound which was two furlongs away from that Statue. It is obvious that P. Ws. 2 and 6 were undoubtedly inhabitants of the locality in which the accused was proposed to be stopped or searched.

But very strangely the Magistrate thought that P. W. 2 was residing in Champion Reef and Mr. Ramaswamy Iyengar, the learned Advocate for the accused, had to admit that the Magistrate committed a mistake in thinking so. So what is very clear and indisputable is that while P. Ws. 2 and 6 were inhabitants of the locality in which the search was proposed to be made. P. W. 5 was in that locality partaking of some refreshments in a hotel at the time when the accused was (expected to reach the Mahatma Gandhi Statue.

8. It is thus obvious that the Magistrate was not right in thinking that there was any transgression of the provisions of Section 103 of the Code of Criminal Procedure if that is what he thought about it. Further Mr. Ashrit, the learned Government Pleader, is, in my opinion, right when he contends that even if any of those three witnesses were not inhabitants of the locality in which the search was proposed to be made, whatever may be the right in the accused to resist the search, if it was proposed to be made with the assistance of persons not referred to in Section 103(1), the search with the assistance of such persons is not by itself liable to be denounced as an illegal search. That this is the correct view to take is what is clear from the decision of the Supreme Court *Radha Kishan v. State Of U. P.*, : (1963) IILLJ667SC .

In a case where the witnesses required to attend the search are not inhabitants of the locality where the search is made or the incriminating articles are produced even before such search is made in that way, no question as to whether the search is illegal or whether the production of the incriminating articles can be ignored could properly arise. The real question is whether the witnesses who attended the search or who were present when the incriminating articles were produced or recovered could be regarded as truthful witnesses and whether their evidence is entitled to credence.

9. So, in my opinion, the Magistrate was wrong in thinking that there was any feature of what happened at the Mahatma Gandhi Statue which could lead to the nullification of the seizure of the sponge gold if really the sponge gold was produced by the accused as stated by P. Ws. 2, 5, 6 and 7.

10. Now the Magistrate was disposed to think that P. W. 1 had collected some kind of a hand picked group of persons to attend the proposed search. He pointed out that P. W. 2 was a cycle shop keeper and it was also further pointed out that P. W. 5 was an actor who was hoping to get an employment through the good offices of me Superintendent and that P. W. 6 was a mining employee. It does not appear to me that any of these reasons can be considered to be a good reason for distrusting the testimony of these three witnesses if their testimony was otherwise dependable.

Nor is there any substance in the observation made by the Magistrate that P. W. 7 should have invited one of the persons who gathered there when the accused was stopped near the Mahatma Gandhi Statue to attend the search or to attest the Mahazar. P. W. 7 gave evidence that some persons amongst those whom he invited to do so declined to participate in the search. The Magistrate seems to have thought that soon after receiving information that the accused was on his way home with contraband gold in his possession, it was the duty of the Circle Inspector P. W. 7 to proceed to the Police Station nearby and to lodge the information about it so that the officer in charge of that Police Station may make a sufficiently satisfactory selection of the witnesses to be present when the accused was proposed to be searched.

This view taken by the Magistrate is to my mind far too unreasonable to merit acceptance. If the evidence of P. W. 7 is believed, what emerges is that he was expecting the accused to reach the Mahatma Gandhi Statue any moment after he acquired information with contraband gold in his possession, and it would have been quite unwise on his part to leave the place where he proposed to intercept the accused and to proceed to the police Station which he was not bound to do, since, he himself had authority to make the search and to collect the witnesses whom he intended to attend it.

11. In a matter like this it is not for the Magistrate to substitute his own judgment for that of the officer conducting the search as to the selection of witnesses to be present at the proposed search. There are, it should not be forgotten, difficulties in securing the presence of such witnesses and the choice of such witnesses is entirely that of the officer who proposes to make it. The question ultimately is whether the evidence given by those witnesses is demonstrated to be true or whether it is established to be otherwise.

12. I am not therefore disposed to agree with the view expressed by the Magistrate that there was anything either sinister or exceptionable in P. W. 7 asking P. Ws. 2, 5 and 6 to be in attendance when he proposed to intercept the accused.

13. It was pointed out to us by Mr. Ramaswamy Iyengar, and that is also what the Magistrate stated, that according to the evidence of P. W. 6 the accused was stopped and intercepted at a distance of ten feet in front of a cycle shop. Mr. Ramaswamy Iyengar urged that there was some discrepancy between the evidence given by this witness and that given by the others as to the exact place where the accused was intercepted. I am unable to find any such serious discrepancy. The effect of the evidence of those four witnesses is that at some distance from the cycle shop, there was the interception although the distance given by each one of the witnesses is not the same as that given by the other. One of the main reasons given by the Magistrate for reaching the conclusion that the prosecution story is not likely to be true was that P W. 7 did not make a written record of the information which he acquired about the accused being in

possession of contraband gold. P. W. 7 explained that although the information which he received was in respect of a, cognizable offence, and though it was the normal practice to make a record in that way, he did not do so on account of non-availability of sufficient time for that purpose. There is no reason why we should not believe that part of his evidence.

14. Another very strange reason given by the Magistrate in support of his conclusion was that the person from whom P. W. 7 received the information was not called to give evidence. It is plain that it was surely not necessary for the prosecution to examine him. Insistence upon the examination of such informants would strike at the very foundation of the possibility of detection of an offence such as the one with which we are concerned in this case and if every one who gives information in the way in which the informant gave it to P. W. 7 is called to give evidence, sources of information would dry up and the task of detection becomes increasingly difficult. There is no principle justifying the view taken by the Magistrate that it was necessary for the prosecution to call the informant in this case.

15. Now when the accused was examined under Section 342 of the Code of Criminal Procedure during the course of which some questions were put to him as if he was being cross-examined, it was elicited from the accused that he was not riding a bicycle when he was stopped near the Statue. The evidence of all the four witnesses was that he was riding a cycle and that that cycle was also seized along with contraband gold. That is also what was stated in Exhibit P-2.

To corroborate the testimony of those four witnesses, the prosecution called P. Ws. 3 and 4 to give evidence that the accused did hire a bicycle from the shop of P. W. 3 the previous day. Exhibit P-3 the register in which P. W. 3 made entries about the accused hiring the bicycle was also produced. The magistrate did not believe the evidence of P. Ws. 3 and 4 and pointed out that there were entries in Exhibit P-3 relating to September 9, 1963 and September 10, 1963 which had the appearance of having been tampered with. We have looked into those entries and we do find that those entries are extremely clumsy and have all the appearance of having been overwritten.

The evidence of P. W. 3 was that September 10, 1963, was a holiday for his shop and that the accused had hired his bicycle the previous day. But Exhibit P-3 which contains an entry that a person by name Hajee hired abicycle on September 9, 1986 fa an entry which appears to have been overwritten. Entries were also made about some transactions of September 10, 1983 which admittedly was a holiday, and have been scored out. There were two entries relating to September 9, 1968 and both those entries purport to record the hiring made by Hajee which was the name of the accused, at 11-55. I would not place any reliance upon entries made in that way in Exhibit P-3 which is a register in which on no other page we found entries made in the same clumsy and suspicious way in which the entries were made on September 9, 1963 and September 10, 1963.

16. In my opinion, it was really not necessary for the prosecution to call P. Ws. 3 and 4 to give evidence that accused arrived near the Statue on a bicycle. If P. Ws. 2, 5, 6 and 7 gave evidence that he did arrive on a bicycle and if they are witnesses of truth, it was surely not necessary for the prosecution to produce evidence in corroboration of that part of their evidence which related to the Journey performed by the accused on a bicycle which was after all a collateral and subsidiary matter.

By calling P. Ws. 3 and 4 to give evidence about the hiring of the bicycle, the prosecution unnecessarily invited some kind of suspicion about the veracity of P. Ws. 2, 5, 6 and 7 whose evidence otherwise strikes me as quite dependable and trustworthy. It seems to me that P. W. 3 who is the owner of the cycle shop deliberately made some alterations in Exhibit P-3 with reference to the entries relating to September 9, 1963 and September 10, 1963 with a view to afford some assistance to the accused by making those entries appear suspicious or it may be that the bicycle which the accused rode on that day was not really a hired bicycle or that it was a bicycle which he had hired from some one else and not from P. W. 3.

17. However that may be, I am not willing to disbelieve the evidence given by P. Ws. 2, 5, 6 and 7 that the accused did reach the Mahatma Gandhi Statue on a bicycle who ever may be the person who provided him with that bicycle. The

Magistrate, in my opinion, should not have attached, as he did, undue importance to the suspicious features displayed by Exhibit P-3 or to the discrepancies in the evidence of P. Ws. 3 and 4 as to the exact point of time when the attempt was made for the return of the bicycle.

18. In my opinion we should dissent from the Magistrate and say that the evidence of P. Ws. 2, 5, 6 and 7, trustworthy as it is, was wrongly discarded by the Magistrate. We should also say that the evidence of P. Ws. 2, 5 and 6 is evidence given by disinterested and independent witnesses to distrust which there were no reasons. Their evidence receives corroboration from the Mahazar Exhibit P-2 which was prepared at 6-20 P. M. after the accused was searched. Although Mr. Ramaswamy Iyengar submitted to us that the accused was taken to the police station after a great delay, it does not appear to me that there has been any such delay. He was produced before the police station at 8-30 P. M. and it is not unintelligible that the interval, after the accused was intercepted, was occupied by the preparation of the Mahazar and the other formalities.

19. I must now advert to the evidence of D. W. 1 who was called on behalf of the accused to support what in effect is a plea of alibi. D. W. 1 is a registered medical practitioner and his evidence was that on September 10, 1965, the accused came to his clinic at about 5-30 P. M. saying that his son was suffering from typhoid and that after examining the patient he advised the accused to administer orange juice to the patient and no other food. He added that thereafter the accused left the clinic.

20. This evidence was adduced for the obvious purpose of demolishing the prosecution case. I do not see how even if the evidence of this witness is believed, it could have that effect. The accused did admit that he was intercepted on the date of the Incident but denied that he produced any sponge gold. Even otherwise I do not think that the evidence of D. W. 1 establishes that the accused went to him on the evening of September 10, 1983. D. W. 1 admitted that he had maintained no record of the visits made to him by his patients. He explained that he was able to name September 10, 1983 as the date of the visit of the accused, since, on the next day, the accused came and told him that he had been arrested

on the previous day. It may be that the accused did not go to D. W. 1 the very next day and it is possible that he went on some other day and told him that he had been arrested on the previous day for the purpose of creating evidence to support the plea of alibi. I am disposed to think that that was what he did.

21. It is in my opinion not possible to say that the accused went to D. W. 1's clinic on September 10, 1983 particularly since D. W. 1 is not able to remember the other dates on which the accused visited his clinic.

22. Since the finding of the Magistrate which rested on the evidence of P. W. 1 was that what was produced by the accused was sponge gold and he did not offer any explanation as to how he came to be in possession of that sponge gold which is a mining material as defined by the Act, his possession of the sponge gold which he produced, was, an offence punishable under Section 6 read with Section 18 of the Act. That being so we should feel fully justified in reversing the order of acquittal and in substituting for it a conviction which in the circumstances is inevitable.

23. Although at one stage there was a discussion of the question whether as required by Section 4 of the Act the provisions of Sections 5 to 20 of the Act had been extended to the area in which the offence was committed. Mr. Ramaswamy Iyengar the learned Advocate for the accused eventually told us that he would not dispute that those provisions had been extended by the prescribed notification. It is obvious that Mr. Ramaswamy Iyengar is right in making this submission since otherwise it would have been quite easy for Mr. Government Pleader to place before us the relevant notification which must have been issued by the State Government under Section 4. Any other supposition when it is remembered that the place where the offence was committed is part of the gold mining area would be inconceivable.

24. Mr. Ramaswamy Iyengar however submitted to us that the sentence which we should impose on the accused should not overlook the long interval of time which has elapsed, and Mr. Government Pleader does not very rightly insist upon a sentence of imprisonment. Taking all the circumstances of the case, it seems to me that we should convict the accused of an offence punishable under Section 6

read with Section 13 of the Act and sentence him to pay a fine of Rs. 100/- (One Hundred). We should also direct that in default of the payment of fine, he should suffer simple Imprisonment for a month. It is so ordered.

**Ahmed Ali Khan, J.**

25. I agree.

26. Order accordingly.

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