

Abdul Rashid Vs. State of U.P.

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SooperKanoon Citation : sooperkanoon.com/474261

Court : Allahabad

Decided On : Apr-26-1991

Reported in : 1991CriLJ3065

Judge : K.P. Singh and ;B. Dikshit, JJ.

Acts : Railway Property (Unlawful Possession) Act, 1966 - Sections 2 and 3;
;Code of Criminal Procedure (CrPC) - Sections 397 and 401

Appeal No. : Criminal Revn. No. 595 of 1990

Appellant : Abdul Rashid

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Ravindra Rai, ;P.L. Sawhney, ;Ganga Singh and ;P.C. Srivastava, Advs.

Judgement :

K.P. Singh, J.

1. The accused-applicant, in revision, named Abdul Rashid, and his son, Shahwaz, were tried for the offence under Section 3 of Railway Property (Unlawful Possession) Act, 1966.

2. On 7-11-1978 the house of Abdul Rashid applicant in revision, situate near Railway Compound, Hapur, district Ghaziabad, was searched by Sri A. N. Tewari along with other police force. Two iron ladders and four tie bars were recovered. On the basis of the recovery-memo a case was registered in the general diary at G.R.P. Hapur. The accused were put on trial and they have been convicted by the Judicial Magistrate, Northern Railway, Moradabad, through his judgment dated 15-12-89. Both were convicted and sentenced to one year's rigorous imprisonment. Aggrieved by the judgment of the trial court the accused preferred Criminal Appeal No. 4 of 1990 which was decided by the learned Sessions Judge, Moradabad on 20th March, 1990. The appeal of Shahwaz was allowed and that of the accused-applicant, Abdul Rasheed, was dismissed. Against the judgment of the appellate Court dated 20th March, 1990, the accused-applicant, namely, Abdul Rasheed, preferred the above noted revision petition under Section 397/401, Cr.P.C. A learned single Judge of this Court summoned the record on 24-4-1990. On 16-8-1990 the learned single Judge issued notice for enhancement of sentence against Abdul Rasheed, accused-applicant, and also notice to Shahwaz why he should not be convicted and sentenced according to law. At the end of his order the learned single Judge expressed himself as below :

'Meanwhile, in case the State has filed an application for leave to appeal against Shahwaz accused who was acquitted by the lower appellate Court, the office is directed to submit the said file and connect the same with the record of the present revision.

List the case for hearing immediately after the necessary papers regarding Shahwaz are received from the C.J.M. concerned.'

3. From the perusal of the order dated 15-10-90 it appears that Shahwaz accused has furnished surety and the accused-applicant, Abdul Rasheed, was also directed to be release on bail on furnishing two sureties of Rs. 5000/- each and the personal bond of the like amount to the satisfaction of the Chief Judicial Magistrate, Moradabad. Per report of the office dated 26-10-90 it appears that notice of enhancement of sentence issued against the applicant, Abdul Rasheed, could not be served with the report that he is in jail'. It appears on the office report

the learned single Judge passed the following order :--

'Perused the office report. No further orders are necessary. The case is now cognizable for hearing by a Division Bench and not by me.

Sd/- R. R. M.'

4. On 3-12-1990 Hon'ble the Chief Justice nominated myself and another Hon'ble Judge for hearing the revision petition. In this way, the matter has come up before us.

5. On enquiry by us as to whether the learned A.G.A. would support the impugned judgment or would argue the case for enhancement of the sentence and the notice issued to the acquitted co-accused, Shahwaz, for conviction and sentence. He frankly stated that no appeal against acquittal of the accused, Shahwaz, has been preferred by the State. Therefore, no question of conviction and sentencing the aforesaid accused arises in the facts and circumstances of this case. He drew our attention to the provisions of Section 3 of the Railway Property (Unlawful Possession) Act, 1966 and suggested that the Court could pass minimum sentence for imprisonment for one year and also fine not less than Rs. 1000/-. Since in the present case only one year's sentence has been imposed upon the accused-applicant, therefore, his sentence should be enhanced. In our opinion the suggestion of the learned A.G.A. has no merits. It would be better to quote the relevant section which reads as below :--

'Section 3. Whoever is found, or is proved to have been, in possession of any railway property reasonably suspected of having been stolen or unlawfully obtained shall, unless he proves that the railway property came into his possession lawfully, be punishable --(a) for the first offence, with imprisonment for a term Which may extend to five years, or with fine or with both and in the absence of special and adequate reasons to be mentioned in the judgment of the Court, such imprisonment shall not be less than one year and such fine shall not be less than one thousand rupees.'

6. In our opinion the bare perusal of the provisions does not lead to an inference that a Court must impose a sentence of one year as well as a fine of one thousand rupees. It is in the discretion of the Court to pass sentence of imprisonment or fine or both. Ordinarily, the imprisonment shall not be less than one year and the fine shall not be less than one thousand rupees unless the Court gives special and adequate reasons for awarding lesser punishment. In the present case, the courts below have sentenced the accused-applicant to one year's rigorous imprisonment. We think that the court below could imprison the accused-applicant or could punish the accused by imposing fine only. When the Court in its discretion decides to punish the accused with imprisonment and fine both, ordinarily it shall not award imprisonment for less than one year and the fine not less than one thousand rupees. For special and adequate reasons, a Court can award lesser sentence and lesser fine for the first offence. No doubt, for the second offence under Section 3(b) of the above Act the court must pass sentence of imprisonment and also fine. But, for the first offence the law contemplates the imposition of imprisonment or fine or both whereas for the second offence it contemplates imprisonment for a term and also fine. Therefore, in the facts and circumstances of this case, we are unable to agree with the suggestion of the learned A.G. A. that the accused-applicant could not be imprisoned for one year only. Accordingly, we reject the suggestion of the learned A.G.A. for enhancing the sentence of the accused-applicant.

7. It is noteworthy that the counsel for the accused-applicant, named, Abdul Rasheed, have not appeared before us. We have perused the impugned judgments and have gone through the evidence on record. In our opinion the accused-applicant, Abdul Rasheed, is entitled to benefit of doubt in the facts and circumstances of this case. The courts below have recorded a finding to the effect that the recovered articles from the land of the accused-applicant, Abdul Rasheed, belonged to railways. The courts below have relied upon the oral evidence and the possibility that the recovered articles can be only in the use of railways. Therefore, the recovered articles belong to the railways. The learned Sessions Judge vide paragraph 13 of his judgment has recorded the following findings :--

'It has been established from the evidence of Sri A.N. Tewari and R.P. Singh respectively PWs 4 and 1 that these properties were the properties of Railways. Whether mark of Railway has been fixed or it is not apparent on the goods, is not material especially because these goods had not been claimed by the accused Abdul Rasheed. So the technical defect will not be of any help to the accused, specially in the light of the statement of PW 2 S.P. Srivastava and PW 3 J.K. Saxena.'

8. Similar is the finding recorded by the trial Court on the basis of oral evidence and the circumstance that the recovered articles could be used only by the Railways. Therefore, the recovered articles would belong to the Railways. Section 2(d) of the above mentioned Act defines 'railway property' as below :--

'Railway property' includes any goods, money or valuable security or animal, belonging to, or in the charge or possession of, a railway administration;'

9. In the absence of documentary evidence regarding the recovered articles belonging to the railways a doubt has crept in our mind about the correctness of findings recorded by the courts below to the effect that the recovered articles belonged to the railways. The best evidence in the form of documentary evidence has not been adduced in the case. Therefore, we are not satisfied with the findings of the courts below regarding the recovered articles belonging to the railways. In the statement of P.W. 2 it has come that he did not know in whose charge the iron ladders were and wherefrom they were prepared. In the statement of P.W. 3 it has also been mentioned that the P.W. 3 did not know in whose charge the tie-bars were when they were stolen. He could not say whether they were entered in any railway register. He has also stated that the tie-bars were also prepared by the private factories. He has also stated that the tie-bars were 60 years' old and that they could be disposed of in case they were not fit for use. P.W. 4, Ajai Narain Tewari has stated that he had not received any information about the loss of iron ladders. Ordinarily loss of the goods were reported by the concerned department. In the present case we do not find any evidence on the record in form of documentary evidence as to whether the recovered articles belonged to the railways or that they were lost by the railways at any point of time.

10. It would not be out of place to mention here a ruling of the highest Court reported in : 1970 CriLJ1647 , Kashmiri Lal v. State of Uttar Pradesh, wherein their Lordships of the Supreme Court while dealing with the 'railway stores' have indicated as below :--

'Mere unlawful possession of the property of any railway administration is not an offence. The prosecution must also prove that the articles were being actually used or were intended to be used for by the railway. Thus any article which is the property of a railway administration but which has been discarded or rejected for further use would be outside the definition of railways stores.'

11. In the present case when some of the recovered articles were 60 years' old or 10 years' old, a duty was cast upon the prosecution to lead some evidence to indicate that the recovered articles were not amongst the disposed of articles. It has come in evidence that when the articles were not fit for railways' use they used to be disposed of. In the present case the evidence on the record is not sufficient to prove that the recovered articles were not amongst the disposed of articles and that they belonged to railways at some point of time in the form of the documentary evidence. For want of documentary evidence we do not see eye to eye with the Courts below regarding; the finding that the prosecution has succeeded in providing conclusively that the recovered articles belonged to the railways at some point of time. For want of evidence the possibility of the recorded articles might be amongst the disposed of articles cannot be ruled out.

12. The learned A.G.A. has suggested that this Court has ample powers to enhance the sentence in its revisional jurisdiction. A few cases have been cited by the learned A.G.A. in support of his contention. We have no hesitation in accepting the suggestion and our view on the point is well supported by the decisions of the highest court reported in : 1976 CriLJ1721 , Nadir Khan v. The State (Delhi Administration) : 1977 CriLJ964 Eknath Shankarrao Mukkawar v. State of Maharashtra, and : 1980 CriLJ211 , Bechan Singh v. State of Punjab. According to us there cannot be any quibble about the High. Court having jurisdiction for enhancing the sentence in its revisional jurisdiction even if no appeal had been filed by the State.

13. In the facts and circumstances of this case it has come to our notice that the articles were recovered not from the house of the accused-applicant, Abdul Rasheed but from the Verandah and the adjoining land of the house of the applicant which can be characterised as open space. The accused did not claim the articles recovered from the land belonging to the applicant in revision. No evidence has been led by the prosecution of any neighbour to prove that the recovered articles were being used by the accused. In this state of affairs it is difficult to say that the recovered articles were in possession of the accused. Moreover, the family of the applicant in revision consists of his son, Shahwaz and others also as is evident from an affidavit, filed in this case that another son of the applicant had applied for bail. However, at least two members of the family were involved in the alleged offence. One of them has been acquitted and the learned A.G.A. has frankly and rightly admitted that the accused acquitted cannot be convicted and sentenced in the facts and circumstances of this case.

14. In AIR 1933 All 437 : (1933 (34) Cri LJ 930), Ram Charan v. Emperor, a learned single Judge of this Court has observed as below :--

'.....Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and can exercise it. A person cannot be said to be in possession of a thing unless it is shown by evidence that he had dominion over it and knew that he had it. The mere fact that a thing is found in a house occupied by a person in common with others or at a place in the house which is as much accessible to others as to him is no proof that he was in possession of it. To bring it home to him some additional circumstance ought to be established, for example, that it was found in a room exclusively occupied by him or in a box or trunk or other receptacle exclusively used by him. Without proof of some such fact as gives rise to the inference that he and none else to the exclusion of himself was in possession of the article in question. It is true that in many cases evidence of the kind illustrated is difficult to obtain as outsiders cannot be in a position to give the requisite evidence and the members of the family are interested in suppressing evidence. But, difficulty in securing evidence cannot obviously justify dispensing with it and assuming the guilt of any one of the members of the family.'

15. In the present case Sri Ajai Narain Tewari in his statement to Court has assigned main role to Shahwaz who has been acquitted by the court below and in our opinion the appellate court rightly gave benefit of doubt to Shahwaz and in that view of the matter it was but proper for the appellate court to have given benefit of doubt to the accused-applicant, Abdul Rasheed, in this revision. Merely (because) the alleged articles were recovered from the land of the applicant (it) does not lead to conclusive proof that the accused-applicant was in possession of those articles in the facts and circumstances of the case. To our mind, the prosecution has utterly failed to prove that the recovered articles were in use and possession of the accused-applicant and no resident of the colony had been examined to prove the possession of the accused-applicant over the recovered articles.

16. For the foregoing discussions, the revision of the accused-applicant, named Abdul Rasheed, succeeds and is hereby allowed. The accused-applicant is given benefit of doubt in the facts and circumstances of this case. Notice issued for enhancement of sentence is hereby discharged and the notice issued to the co-accused, Shahwaz, for conviction and sentence is also hereby discharged. The personal bonds and sureties furnished by the co-accused are also hereby discharged. The applicant is acquitted of the offence under Section 3 of the Railway Property (Unlawful Possession) Act, 1966 on the ground of benefit of doubt. If the applicant is on bail in pursuance of the order of this Court, his personal bond and sureties, if any, also stand discharged. If the accused-applicant has already served out the sentence imposed by the court below, no further direction is needed in respect of the accused-applicant concerning the offence Under Section 3 of the Railway Property (Unlawful Possession) Act, 1966.