

**Natabar Behera Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/529515](http://sooperkanoon.com/529515)

**Court :** Orissa

**Decided On :** Mar-12-1965

**Reported in :** 1965CriLJ692

**Judge :** G.K. Misra, J.

**Appellant :** Natabar Behera

**Respondent :** State

**Judgement :**

ORDER

**G.K. Misra, J.**

1. Natabar Behera is a driver in the Public career Truck O. R. C. 1051 belonging to Aska Sugar Factory. On 26-2-1964, he was produced before the Mobile Court who is a judicial Magistrate, 1st Class, Aska at 5.30 p.m. The charge against him was that the vehicle which he was plying did not carry a valid route permit and the permit which he produced was valid only up to 2-7-1962. The accused was fined Rs. 50/-, in default to undergo simple imprisonment for seven days under Section 123 of the Motor Vehicles Act on admission, Later on he found that the valid route permit had been kept in the Truck just below the expired route permit. He being new to the vehicle did not know it. On 28-2.64, he reported the matter to the Magistrate who forwarded the record to the Additional District Magistrate (Judicial) for necessary action. Subsequently the driver also filed a regular application

asking for a reference to the High Court. The route permit which was produced before the Additional District Magistrate bears the date 16-6-1962 and is valid for the period from 17-6-62 to 16-5-67. Thus the vehicle had a valid route permit at the time of the detection. Before the learned Additional District Magistrate there was no dispute on behalf of the State that the permit so produced was genuine and valid. On the aforesaid facts, the learned Additional District Magistrate (Judicial) made a reference to the High Court for interference and for setting aside the conviction.

2. Mr. Mohapatra on behalf of Mr. Mohanty was permitted to argue this reference. He contended that -

Though the reference is without jurisdiction the High Court in exercise of its revisional power under Section 439 (1), Criminal P. C. can receive additional evidence and set aside the conviction.

It is necessary to examine the correctness of this contention.

3. Under Section 438, Criminal P. C., the Sessions Judge or the District Magistrate may, if he thinks fit, on examining under Section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination. The position is not disputed that in exercise of its powers under Section 438, the Sessions Judge or the District Magistrate who can make a reference, cannot take any additional evidence. See *Mt. Mahaginia v. Ramcharan* 15 Cri LJ 575 : AIR 1914 All 368 (1). If there is no additional evidence before the referring authority, he has no jurisdiction to make a reference on the basis of the additional evidence. The reference is therefore without jurisdiction.

4. Section 439(1), Criminal P. C. lays down that:

In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its Knowledge, the High Court may in its discretion, exercise any of the powers conferred on a Court of appeal by Sections 423, 426, 427 and 428....

Though this case has come to the notice of the High Court by a wrong reference, under Section 439, the High Court can exercise revisional jurisdiction, (See Emperor v. Bhatu Sadu AIR 1938 Bom 225) I accordingly exercise my revisional Jurisdiction to hear this matter.

5. Under Section 428(1), Criminal P. C. in dealing with any appeal under this Chapter, the appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the appellate Court is a High Court, by a Court of Sessions or a Magistrate. The revisional Court has been vested with powers to take additional evidence under Section 439 (1), Criminal P, C. (See Ramakantha Khadigar v. State : AIR1957 Ori10 ). It is, therefore, open to me to accept the valid route permit as a piece of additional evidence.

The only point for consideration, however, is whether it should be accepted as additional evidence. Section 428 (1), Criminal P. C, does not state the circumstances in which additional evidence is to be taken. The only limitation prescribed is, if it thinks additional evidence to be necessary, it shall record its reasons. In what circumstances additional evidence is to be taken, a full exposition of the legal position was given in Akhtar Hussain v. Emperor AIR 1925 Pat 526. Mr. Justice Macpherson observed:

The scope of Section 428 is prima facie not limited by any consideration save that the appellate Court should be of opinion that additional evidence is necessary and should record its reasons. The object of the section is just as much the prevention of the escape of a guilty person through some carelessness or ignorant procedure as the vindication of the innocence of a person wrongfully accused where the same carelessness or ignorance has omitted to bring on the record circumstances essential to the elucidation of truth. It is impossible on the plain words of the enactment to differentiate between these two cases. It would not be sound exercise of discretion to do so in the circumstances of India, where justice when it falls does so by erroneous acquittal at least as much as by erroneous conviction.

I am in respectful agreement with the aforesaid observations. To the same effect is a decision in State v. Jai Prakash : AIR1959 All129 .

6. It is clear from the admitted position that there was a valid route permit of the vehicle which was not known to the accused. As the Mobile Court convicted him then and there, he had also no opportunity to make enquiries from the owner so as to know the correct position. The driver was a new to the truck and the valid route permit was kept below the previous route permit which had already expired. In the circumstances, the accused could not bring the true position to the notice of the Court. No better case can be available whereunder additional evidence will be accepted. I accordingly accept the valid route permit as a piece of additional evidence.

7. On the existence of the valid route permit the accused is not guilty under the charge and is entitled to an acquittal.

8. I would accordingly discharge the reference and allow the revision. The accused is acquitted. Payment of fine already made be refunded. The route permit be returned to the owner.