

State of Orissa Vs. Subash Prasad

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Court : Orissa

Decided On : May-09-2005

Reported in : 100(2005)CLT68

Judge : P.K. Tripathy, J.

Acts : Railway Property (Unlawful Possession) Act, 1966 - Sections 3 and 11;
[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 41 to 60 and 91 to 105;
[Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 103, 103(1) and 103(2)

Appeal No. : Govt. Appeal No. 9 of 1987

Appellant : State of Orissa

Respondent : Subash Prasad

Advocate for Def. : Aswini Kumar Mishra, ;S.K. Das and ;S.B. Jena, Advs.

Advocate for Pet/Ap. : A.K. Mishra, Standing Counsel

Disposition : Appeal dismissed

Judgement :

P.K. Tripathy, J.

1. Heard the parties and the Government Appeal is dismissed for the reasons indicated below.

2. Accused-Respondent was prosecuted in the court of the J.M.F.C., Panposh for the offence under Section 3(a) of Railway Property (Unlawful Possession) Act, 1966 (in short 'the Act, 1966') on the allegation that while going on a motor cycle he was found carrying a gunny bag containing some Railway properties. In course of the trial, those properties were marked M.Os. I to XV. Amongst those articles coupling were marked M.Os. I & II, Fish-Plates as M.Os. III, IV and XV and Steel Keys as M.Os. V to XIV. Prosecution examined four witnesses in support of its case. Out of them, P.W. Nos. 1 & 4 were the Official witnesses who participated in detection of the case and seizure of the property and P. W. Nos. 2 & 3 are the other Official witnesses who examined the seized articles and opined in their reports respectively marked as Exts. 4 & 5 that such property belongs to the Railway Department and not available in open market nor in auctionable condition.

3. Learned J.M.F.C. on assessment of such evidence delivered the order of acquittal on 30.6.1986 in 2(c) CC No. 252/83 (Trial No. 262/84) on the grounds that prosecution failed to prove that the seizure was made in accordance with law and in presence of independent witnesses and that P.W. Nos. 2 & 3 were not qualified to identify the seized articles as Railway property.

4. Learned Standing Counsel argues that evidence of P.W. Nos. 2 & 3 in identifying the articles as the railway property cannot be questioned because of their corroborating evidence and occupation in the Railway Department. Learned counsel for the respondents does not dispute to that argument.

5. On perusal of the evidence of P.W. Nos. 2 & 3 and the finding of the Trial Court, this Court finds that Learned Magistrate was not correct in his approach in rejecting the evidence of P.W. Nos. 2 & 3 who identified the seized property as the Railway Property. P.W. No. 2 was Head Train Examiner and P.W. No. 3 was Permanent Weigh Inspector. Their occupational experience and nature of job is sufficient to qualify them as competent persons to identify the Railway Property used in Trains and Railway Tracks. Perhaps being conscious of that factum, learned counsel for the respondent does not challenge to the credibility of those two witnesses and acceptability of their evidence in the above context. Therefore that finding of the Trial Court is set aside and it is held that the property involved in

the case was Railway property.

6. Learned Standing Counsel further argues that P.W. Nos. 1 & 4 being two responsible Officers of the Railway Department, therefore, their evidence could not have been thrown over board when they are consistent and corroborating relating to the accused carrying gunny bag containing aforesaid Railway Properties and their evidence regarding recovery and seizure of the same from the possession of the respondent. In that context, learned counsel for the respondent supports the finding recorded by the Trial Court that a valid seizure has not been proved.

7. Learned Standing Counsel argues that Trial Court rejected the evidence of P.Ws. 1 & 4 and the factum of search, recovery and seizure of the M.Os. I to XIV, inter alia, on the ground of non-securing two independent witnesses in course of search, recovery and seizure. According to him securing attendance of two independent witnesses under the relevant fact situation was not possible. He also argues that provision in Section 100 of the Code of Criminal Procedure, 1973 (in short 'the Code') is not applicable to a case of search and seizure of the present nature and therefore absence of two independent witnesses of the locality does not invalidate the search and seizure. Learned counsel for the accused/respondent however argues that Sub-section (4) of Section 100 of the Code mandates securing attendance of two or more independent and respectable inhabitants to witness the search and the seizure and, therefore, finding of the Trial Court is supported by that law.

8. On perusal of the evidence on record, the relevant finding of the Trial Court and the aforesaid argument of the parties, this Court finds that the Trial Court indeed did not comprehend the provision of law which is relevant on the context relating to search and seizure. It may be noted that according to Section 11 of the Act, 1966, all searches and arrests made under that Act be carried out in accordance with the provision of the Code regarding searches and arrests respectively. In other words, in course of investigation on enquiry of a crime under the Act 1966 provision in the Code regulate the manner in which arrest and search are to be made. Chapter-V of the Code from Section 41 to 60 provides the procedure in the matter of arrest of persons. Section 51 thereof provides that an arrested person can be searched and

any article found in his possession, except necessary wearing apparels be seized and receipt be granted to the person who was searched. That provision does not require presence of independent witnesses in the manner it is provided in Sub-section (4) of Section 100 of the Code. Chapter-VII of the Code runs from Sections 91 to 105. Section 100 of the Code relates to search of a closed place and in that context, Sub-section (4) provides that attendance of two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality if no such inhabitant of said locality is available is to be secured as a pre-condition for conducting a search under Section 100 of the Code. In the instant case, according to the allegation of the prosecution, the accused was moving in a Motor Cycle carrying a gunny bag and he was stopped and searched. Thus case of search and seizure in the instant case is not covered by the provision of Section 100 of the Code. Then comes Section 102 of the Code, which authorizes Police Officer to seize certain property. That Section reads as hereunder:

'102. Power of Police Officer to seize certain property:

(1) Any Police Officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such Police Officer, if subordinate to the officer in charge of police station, shall forthwith report the seizure to the officer.

(3) Every Police Officer acting under Sub-section (i) shall forthwith report the seizure of the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the court, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders to the Court as to the disposal of the same.'

9. In view of Section 11 of the Act, 1966, in a case of present nature, competent officers from the Railway Protection Force conducted the seizure in accordance with above quoted provision. The above quoted Section 102 of the Code does not

mandate about securing attendance of witnesses before conducting search and seizure. Therefore, Learned Magistrate without finding out as to which of the provision relating to search and seizure is applicable in a case of this nature recorded the finding wrongly that non-securing of two independent witnesses invalidates the search and seizure.

10. It is thus clear that if a search is made under Section 51 before conducting such search, the accused must be arrested. In that case too attendance of witness is not the sine qua non for a valid search. In the case of search under Section 100, attendance of independent witnesses in terms of the language employed therein is the condition precedent unless it is properly explained regarding incapability to secure attendance of such witnesses. In case of a search governed by Section 102 of the Code, procurement of witnesses before search and seizure is also not the requirement of law. In course of hearing, this Court gets reference of the case of *Sunder Singh v. State of Uttar Pradesh*, AIR 1956 SC 411. In that case the accused after committing a murder of a colleague and leaving no eye witness to witness the occurrence was searched because he was last seen with the deceased who had suffered a homicidal death due to bleeding injuries and findings suspected blood stains on the shoes of the accused, the same was seized by the Investigating Officer without securing attendance of respectable independent witness.

Referring to Sub-sections (1) & (2) to Section 103 of the Code of Criminal Procedure, 1898 which corresponds to Section 100 (4) and (5) of the present Code, the Apex Court held that 'on the face of it, Section 103 would not apply to the seizure of the shoes which were being worn By the accused at the time he was with the investigating police officer. The Section applies when a search is to be made of a place. It does not apply to the search of a person'.

11. So far the search and seizure in the present case is concerned that being governed by Section 102 of the Code, securing attendance of independent witness is not the sine qua non to validate such seizure. But as a matter of giving credential to the factum of search and seizure securing attendance of independent witness, if available, is always advisable so as to exclude the possibility of the

criticism of mala fide intention against the accused. Evidence of P.Ws. 1 & 4 who were respectively Sub-Inspector and Constable in Railway Protection Force indicates that in course of the night patrolling at about 10.30 P.M. they detected that accused was coming in a Yezdi Motor-Cycle and out of suspicion they stopped and searched him and the gunny bag tied to the back carrier of the Motor Cycle was searched and the material objects were found in that gunny bag. In view that evidence, the finding of the Trial Court that such search and seizure is illegal in the absence of two independent witnesses is not sustainable in the eye of law because of the provision of law already discussed in the preceding paragraph.

12. Attending to the third and the final finding of the Trial Court, Learned Addl. Standing Counsel argues that the contradictions found and improbability noticed is also not sustainable in the eye of law. This Court finds no merit in such arguments inasmuch as Trial Court on a reference to the evidence of P.W. 1 has recorded that P.W. 1 admitted in his evidence in course of cross-examination that the seizure list does not disclose that the Motor Cycle had carrier and that the gunny bag could not have been carried in a Motor Cycle without tying it by use of rope. In other words, in the absence of seizure of such rope, the evidence of P.W. 1 was not found credible in the context of search and seizure. In that context also Trial Court took into consideration the defence plea of the accused/D.W. 1 that he had gone to the R.P.F. Station in the context of release on bail of one Rama Shankar Sahu who was forwarded to the Court in connection with 2(c) C.C. No. 248 of 1983. Indeed the aforesaid circumstances being not disputed by P.Ws. 1 & 4 that gives rise to a genuine suspicion as to actually whether the accused was carrying the seized articles. In that context, though a contrary view can be taken but the view taken by the Trial Court being not suffering from perversity or is found to be unjust or illegal, therefore, while sitting against an order of acquittal, this Court is not inclined to interfere with that finding.

14. Under such circumstance, even if the findings of the Trial Court in the other two context, as already discussed, is found to be non-sustainable but in the context of non-mentioning of a carrier in the Motor-Cycle and non-seizure of rope, if at all used for tying the gunny bag with the Motor-Cycle, the benefit of doubt which has been granted to the accused is not interfered with and accordingly, the

order of acquittal is not disturbed.

In the result, the Government Appeal is dismissed.

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