

Bombay High Court

The Union Of ... vs Mohomad Harun S/O ... on 1 September, 2017

Bench: Swapna Joshi

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY :  
NAGPUR BENCH : NAGPUR.

Criminal Appeal No.45 of 2001

The Union of India,  
through Railway Protection Force, Akola,  
District Akola.

-Versus-

Mohomad Harun s/o Maimudkhan,  
Aged 28 years, R/o.- Bazar Fail, Ward No.17,  
Shegaon, District Buldhana.

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Mr. C.J. Dhumane, Standing Counsel for Union of India.  
Mr. H.R. Gadhia, Counsel for respondent.  
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Coram : Mrs. Swapna Joshi, J  
Date of reserving judgment : 18-0  
Date of pronouncement :

J U D G M E N T

The present appeal has been preferred by the Union of India against the judgment and order dated 17-08-2000 delivered in Regular Criminal Case No.44 of 1995 by the learned Judicial Magistrate First Class (Railways), Bhusawal, whereby the learned Judge acquitted the respondent/accused under Section 3(a) of the Railway Property (Unlawful Possession) Act, 1966 (hereinafter referred as, 'the RPUP Act' for the sake of brevity).

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2] Heard Mr. Dhumane, the learned Standing Counsel for the

appellant/Union of India and Mr. H.R. Gadhia, the learned Counsel for the respondent. I have carefully gone through the record of the case and the impugned judgment and order.

3] The complainant's version, as unfolded during the trial, is as follows :-

Complainant Dattatrya Agarkar (PW-1) was on patrolling duty as a Head Constable at about 8.00 hours to 16.00 hours on 05-02-1995 at Shegaon Railway Yard. At about 11.30 hours, he saw the accused carrying some heavy material on his shoulder, at the side of 'B' Cabin. PW-1 caught hold the accused while he was crossing the railway line which is by the side of cabin. On carrying out the

inspection of the material, which was on the shoulder of the accused, (PW-1) found that it was a iron brake block belonging to the Railway. On making enquiry with the accused, the accused did not give satisfactory answer about the goods. He could not produce the receipt of the said material. The PW-1 then asked the accused to accompany him to Akola and accordingly produced him before ASI- L.K. Dhurve (PW-2). PW-1 then lodged his report about the said incident (Exhibit-7). On receipt of the said report, Enquiry Officer ASI-Dhurve (PW-2) took charge of the said property and seized the same in the presence of two panchas under panchanama (Exhibit-11). ASI-Dhurve recorded the confessional statement of the accused as per his say (Exhibit-12). On 11-02-1995, ASI-Dhurve obtained the certificate from an expert, regarding the fact that the said material was 3 Judg. 180817 appeal 45.01.odt railway property (Exhibit-14). On completion of enquiry, the Enquiry Officer ASI-Dhurve lodged complaint against the accused in the Court on 02-03-1995. The learned Judicial Magistrate First Class conducted the trial, recorded the evidence of the witnesses and after hearing both the sides, acquitted the accused as aforesaid.

4] Mr. Dhumane, vehemently argued that, the learned trial Judge has passed an erroneous and perverse judgment and order, inasmuch, as the learned Judicial Magistrate First Class has not considered the fact that the confessional statement of the accused is admissible in evidence. As per the provisions of the RPUP Act, as the Railway Protection Force authority is not a Police Officer and the confessional statement is not hit by either Section 25 of the Indian Evidence Act, 1872 or Section 162 of the Code of Criminal Procedure, 1973. According to Mr. Dhumane, the officer of Railway Protection Force, making enquiry under Section 8(1) of the RPUP Act, is not a Police Officer conducting an investigation under the Code of Criminal Procedure. It is contended that the confessional statement of the accused clearly indicates that he has committed an offence of theft of the railway property and he was found in possession of the said railway property. In view thereof, the learned trial Judge ought to have convicted him for the offence punishable under Section 3(a) of the RPUP Act. Mr. Dhumane has placed reliance upon the judgment of the Hon'ble Apex Court in case of Balkisan A. Devidayal v. State of Maharashtra, reported in AIR 1981 SC 379 to substantiate his contention.

5] Per contra, the learned Counsel for the respondent Mr. Gadhia

canvassed that the prosecution has failed to prove that the articles which were taken charge from the accused were serviceable railway articles. He further submitted that though the confessional statement of the accused recorded by the Railway Protection Force officials is admissible in evidence, the Railway Protection Force authorities did not follow the procedure laid down in the RPUP Act. Hence, the said confessional statement cannot be relied upon. He further submitted that the trial Judge has rightly taken a view in the matter that the confessional statement has not been proved by the prosecution and this being the appeal against acquittal, no interference can be called

for by this Court as the said judgment delivered by the learned J.M.F.C. is not said to be perverse or illegal.

6] I have carefully considered the rival contentions of the learned Standing Counsel for the appellant/Union of India as well as the learned Counsel for the respondent.

7] It is necessary to go through the evidence led by the prosecution, in order to appreciate the rival contentions of both the sides. The prosecution has examined in all 5 witnesses. Dattatraya Agarkar (PW-1) Head Constable, Laxman Dhurve (PW-2) the complainant who is the Enquiry Officer, Mithailal Ahire (PW-3) is an expert witness, Mahadeo Sul (PW-4) and Ramesh Parwate (PW-5) are the panchas, who did not support the prosecution case and were declared hostile. According to PW-1, on 05-02-1995, he was posted at Shegaon as a Head Constable. At about 11.30 am., he noticed the accused near 'B' Cabin who was 5 Judg. 180817 appeal 45.01.odt crossing railway line with heavy material on his shoulder. (PW-1) apprehended him. He found one brake block on the shoulder of the accused. On enquiry the accused informed to PW-1 that, he took the said material from railway line with intend to sale it. He could not produce any receipt about the said material. He informed his name as Mahommed Harun. PW-1 asked the accused to accompany him to Akola. Accordingly, PW-1 produced the accused with property before ASI-Dhurve (PW-2). PW-1 filed his written report about the said incident (Exhibit-7). 8] ASI-Dhurve (PW-2) deposed that he took charge of the said brake block from the possession of the accused under seizure panchanama (Exhibit-11), in the presence of two panchas. According to PW-2, he recorded the confessional statement of the accused as per his say, in which the accused admitted that, he took the said brake block from yard with intend to sale it (Exhibit-12). PW-2 then got the property examined from Head T.X.R. (PW-3) on 11-02-1995 in his office. He took charge of the certificate issued by the PW-3. During the cross examination PW-2 admitted that, he had not received the shortage memo about the property and he had not enquired about it as to from where and from which department it was stolen. As far as the testimony of PW-3 is concerned, on examination he found that the brake blocks were belonging to railway and it was used for box wagon for braking purpose. PW-3 stated that it was in serviceable condition. He issued the certificate (Exhibit-12). The learned trial Judge found that the seizure of the property was not proved by examining the independent panchas beyond reasonable doubt. The 6 Judg. 180817 appeal 45.01.odt learned trial Judge further came to the conclusion that the confessional statement of the accused recorded by PW-2 is admissible in evidence, however, in the absence of evidence of independent witness, it cannot be relied upon. The learned trial Judge then acquitted the accused as aforesaid.

9] On careful scrutiny of the testimony of the prosecution witnesses PW-1, PW-2 and PW-3, it is noticed that PW-1 and PW-2 are the Railway Protection Force officials and they are not independent witnesses. Moreover, the PW-2 has not followed the provisions under the RPUP Act, while conducting the seizure of the said property.

10] There is certainly some substance in the contentions raised by the learned Counsel for the respondent. In this regard it would be advantageous to go through the provisions regarding the enquiry into offences under the Railway Property (Unlawful Possession) Act, 1966. The Clauses 14 and 14(1) of the procedure required to be followed for conducting enquiries into offences under the

Railway Property (Unlawful Possession) Act are as under :-

"14 - The Enquiry Officer shall then examine orally (interrogate) the person so summoned, concerning the facts and circumstances of the case and record any statement made to him by such person, which will form a part of the case record.

14(i) If the accused wants to make a confessional statement, the same should be recorded in the presence of two respectable and independent witnesses who should also be required to affix their signatures thereon. He should also be produced 7 Judg. 180817 appeal 45.01.odt before a Magistrate of competent jurisdiction and the confession shall be recorded by such Magistrate as required by the provisions of the Code of Criminal Procedure, 1973 (Section 164 and 281)."

11] On plain reading of the above said provisions, the procedure required to be followed for conducting enquiry into the offences under the Railway Property (Unlawful Possession) Act, it is clear that the Enquiry Officer is required to interrogate the accused, in concern with the facts and circumstances of the case and then record the statement made by the accused. Similarly, if the accused wants to make a confessional statement, it should be recorded in the presence of two respectable and independent witnesses, who should also be required to affix their signatures thereon. The accused should be produced before the Magistrate of competent jurisdiction and the confession should be recorded by such Magistrate, as required by the provisions of Sections 164 and 281 of the Code of Criminal Procedure.

12] In the instant case, even assuming that, the Railway Protection Force authority has recorded the confessional statement of the accused respondent, the said confessional statement has not been recorded as contemplated under the Clauses 14 and 14(1) regarding the procedure required to be followed for conducting enquiries into offences under the Railway Property (Unlawful Possession) Act. The learned trial Judge has rightly come to the conclusion that the said confessional statement of the accused has not been recorded in the presence of two independent witnesses.

13] As far as the seizure of the property is concerned, apart from the

bare testimony of PW-1 there is absolutely no iota of evidence on record to show that one brake block was found with the accused and it was taken charge from him. The panchas (PW-4 and PW-5) who were examined on this aspect have not supported the case of the prosecution and they were declared hostile. However, no fruitful purpose was served and noting could be elicited from the evidence of those panchas. Significantly, PW-2 had not received the shortage memo about the property. He failed to enquire as to from where and from which department the property was stolen. He failed to verify whether the property was either lost or missing from any of the railway departments. In the absence of any convincing evidence on record in that regard it is difficult to come to the conclusion that the said property which was allegedly stolen by the accused belongs to the railway department. Thus, the prosecution has not proved beyond reasonable doubt that the

railway property was seized from the accused.

14] The learned Counsel for the respondent has placed reliance upon the judgment of Aurangabad High Court in Criminal Appeal No.362 of 2000 (The State of Maharashtra through Chief Security Commissioner, Secundarabad v. Balaji s/o Manikrao Jadhav and others) and connected matters, decided on 11-01-2016 to substantiate his contention. Wherein the confessional statement of accused was disbelieved as the Clauses 14 and 14(1) were not followed by the enquiry authority.

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15] The judgment of the Hon'ble Apex Court in the case  
Balkisan A. Devidayal v. State of Maharashtra, reported in

AIR 1981 SC 379 is concerned, in that case the prosecution has relied upon the confession recorded by the Railway Protection Force officer under Section 8(1) of RPUP Act. Admittedly, the confessional statements were recorded by the learned Judicial Magistrate First Class as provided in Section 164 of the Cr.P.C. Similarly, the Clauses 14 and 14(1) of the procedure required to be followed for conducting enquiries into offences under the Railway Property (Unlawful Possession) Act are not followed. As per the said provisions, if the accused wants to make a confessional statement, the same should be recorded in the presence of two respectable and independent witnesses who should be required to affix their signatures thereon. The accused should also be produced before a Magistrate of competent jurisdiction and the confession shall be recorded by such Magistrate as required by the provisions of the Code of Criminal Procedure, 1973 (Section 164 and 281).

16] In the instance case, it is not disputed that the Railway Protection Force officer was entitled to make an enquiry under the RPUP Act and the officer under the said Act is not a Police officer for the purposes of Section 25 of the Indian Evidence Act and the confessional statement recorded by him is admissible in evidence. Here the main contention of the learned Counsel for the respondent is that the Railway Protection Force official had not followed the provisions of Clauses 14 and 14(1) of the procedure required to be followed for conducting enquiries into offences under the 10 Judg. 180817 appeal 45.01.odt Railway Property (Unlawful Possession) Act.

17] In these circumstances, in my view, the learned Judicial Magistrate First Class has taken a reasonable and probable view of the material placed before him. The entire evidence is considered by the learned Judicial Magistrate First Class. I do not find any illegality or perversity in the judgment passed by the trial Court. In the present appeal against acquittal, therefore no interference is warranted. The appeal is, therefore, liable to be dismissed. Hence, the following order:-

O r d e r

(a) Criminal Appeal No.45 of 2001 is dismissed.

(b) The judgment and order dated 17-08-2000 delivered by the learned Judicial Magistrate First Class (Railways), Bhusawal in Regular Criminal Case No.44 of 1995 stands confirmed.

(c) The bail bond of the appellant, stands cancelled.

(d) Muddemal property be dealt with as directed by trial Court after the appeal period is over.

JUDGE

Deshmukh