State Of Maharashtra vs Vishwanath Tukuram Umale & Ors on 2 August, 1979

Equivalent citations: 1979 AIR 1825, 1980 SCR (1) 120, AIR 1979 SUPREME COURT 1825, 1979 UJ (SC) 584, 1979 CRI APP R (SC) 288, 1979 SCC(CRI) 893, 1979 ALL WC 663, 1979 (4) SCC 23, (1979) ALLCRIR 435

Author: P.N. Shingal

Bench: P.N. Shingal, Ranjit Singh Sarkaria, O. Chinnappa Reddy

PETITIONER:
STATE OF MAHARASHTRA

Vs.

RESPONDENT:
VISHWANATH TUKURAM UMALE & ORS.

DATE OF JUDGMENT02/08/1979

BENCH:
SHINGAL, P.N.
BENCH:
SHINGAL, P.N.
SARKARIA, RANJIT SINGH
REDDY, O. CHINNAPPA (J)

CITATION:
1979 AIR 1825 1980 SCR (1) 120
1979 SCC (4) 23

ACT:
Railway Property (Unlawful Possession) Act, 1966-S. 3-Conviction under- "Possession of property need not be a subsisting possession" -Sufficient if accused proved to "have been in possession" of property at any point of time.
Indian penal Code-S. 379-Transfer of possession of the property however transient, an essential ingredient of an offence of theft,

HEADNOTE:
Section 3 of the Railway Property (Unlawful Possession) Act, 1966 provides penalty for unlawful possession of railway property, the essential requirements being (1) the property in question should be railway property (2) it

should reasonably be suspected of having been stolen or unlawfully obtained and (3) it should be found or proved that the accused was or had been in possession of that property. The prosecution alleged that accused 1, 2, 5 (respondents) and the other absconding accused had stolen tyres and tubes from a railway wagon in transit, that accused 1 sold them to accused 3, who removed them in his motor lorry. The prosecution further alleged that accused 3 produced some tyres from his lorry but sold the remaining tyres to accused 4. They were later seized from his possession. The prosecution, therefore, contended that accused 1, 2, 5 and the absconding accused were proved to "have been found in unlawful possession of railway property", while accused 3 and 4 were found in "unlawful possession thereof" within the meaning of section 3 of the Act.

The trial magistrate refused to frame a charge under section 3 against any of the accused but framed charges under sections 379461 and 411 of IPC against all the accused. The State's revision application was rejected by the Additional Sessions Judge. The High Court held that it was not necessary to frame the charge under s. 3 of the Act against accused 1, 2, S and the absconding accused but it however, directed that a charge under that section might be framed as an alternative charge only against the accused 3 and 4.

The prosecution evidence had not been recorded. On the question whether on the allegations made by the prosecution there was justification for framing a charge under s. 3 of the Act against the accused 1. 2, S and the absconding accused,

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HELD: 1. The question before the Court was whether it could be said that the accused were found or were proved to have been in possession of the railway property. It was permissible for the prosecution to establish, either that the accused were "found" to be in possession of the railway property, or that they were proved "to have been" in possession thereof. As accused 1. 2, S and the absconding accused were not "found" in possession of the railway property, it was permissible for the prosecution to allege and prove that they had been in possession of that property in order to attract the application of sec. 3 . 11 93E-F] 191

2. In view of the categorical allegations against accused 3 to 4 the High A Court was right in directing that they should be charged for an offence under 8. 3 of the Act. [193H]

3. The allegation against accused 1, 2, 5 and absconding accused was that they had removed the tyres by breaking open the wagon. It is an essential ingredient of the offence of "theft" that the movable property which was the subject matter of the theft should have been "moved" out

of the possession of any person without his consent. This could be possible only if the person moving the property had taken it out of the possession of the person concerned and transferred it to his own possession for the purpose of taking it dishonestly. Therefore, transfer of possession of the property, however transient is an essential ingredient of an offence of theft. The allegation against accused 1, 2, 5 and the absconding accused was therefore to the effect that they "had been in possession" of the railway property in question, and that was sufficient to attract the application of s. 3 of the Act. [194 B-D, F]

4. The High Court erred in taking the view that it was necessary for the purpose of bringing a case under s. 3 to prove that the accused were found to be in possession of the railway property at the time of its seizure, and that it would not be attracted in the case of an allegation that the railway property was the subject matter of dacoity or theft by the accused. The High Court was wrong in holding that s. 3 of the Act was meant to meet a situation "analogous to the one for meeting of which s. 124 of the Bombay Police Act has been enacted." Unlike s. 3 of the Act, that section does not go to the extent of penalising the accused where he is proved to "have been found in possession' of that property. [194G-195A]

5. Although the gravamen under s. 3 of the Act is "possession" of the property, it need not necessarily be a subsisting possession. It is sufficient if the accused was proved to "have been in possession" of that property at any point of time. [195A]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No 51 of 1973.

Appeal by Special Leave from the Judgment and order dated 30-11- 1972 of the Bombay High Court in Crl. Revision Application No. 701 of 1972.

N. M. Phadke and M. N. Shroff for the Appellant. Mrs. Urmila Kapoor, Amicus Curiae for the Respondents. The Judgment of the Court was delivered by SMINGHAL J., This appeal by special leave is directed against the judgment of the Bombay High Court dated November 30, 1972, Upholding the view of the trial court and the Additional Sessions Judge of Jalgaon that it was not necessary to frame a charge under section 3 of the Railway Property (Unlawful Possession) Act, 1966, hereafter referred to as the Act, against accused 1, 2, S and the absconding ac cused, and directing that a charge under that section may be framed as an alternative charge only against accused 3 and

4. The State of Maharashtra feels aggrieved because of the failure to frame a charge under the aforesaid section 3 against the accused mentioned above.

It was alleged that seven tyres and seven tubes were booked from Wadi Bunder goods shed of the Central Railway on March 20, 1971, in wagon No. WR 35775. The seven tyres were stolen by accused 1, 2, 5 and the absconding accused, from the Down Yard of the Bhusawal railway station while in transit, and were kept in the hut of Ragho Motiram Birhade. Accused 1 sold seven tyres to accused 3 for Rs. 2700/-, and accused 3 removed them in his motor-lorry to Savda. He produced four tyres from his lorry, but three tyres were found to have been sold the accused 4 and were seized from his possession. It was therefore specifically alleged that accused 1, 2, S and the absconding accused were proved to "have been found in unlawful possession" of the railway property while accused 3 and 4 were found in unlawful possession thereof within the meaning of section 3 of the Act. The trial magistrate however refused to frame a charge under that section against any of the accused and framed charges for the commission of offences under sections 379, 461 and 411 I.P.C. against all the accused. The State felt aggrieved and applied for a revision of that order, but it was upheld by the Additional Sessions Judge, Jalgaon, as mentioned above. We have made a mention of the view which was taken when the matter went up to the High Court in revision.

It is not in controversy before us that in the absence of the evidence of the prosecution, which has still to be recorded, the case has to be examined on the basis of the allegations mentioned above, and the short question therefore is whether they justify the framing of a charge under section 3 of the Act against accused 1, 2, S and the absconding accused.

Section 3 which provides the penalty for unlawful possession of rail way property reads as follows:-

> "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-
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> (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 A shall not be less than one year and such fine shall not be less than one thousand rupees;
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> (c) for the second or a subsequent offence, with imprisonment for a term which may extend to five years and also with fine 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 two years and such fine shall not be less than two thousand rupees."

The essential requirements of the section therefore are that

(i) the property in question should be railway property,

(ii) it should reasonably be suspected of having been stolen or unlawfully obtained, and (iii) it should be found or proved that the accused was or had been in possession of that property. It is not in dispute before us that the property in question was railway property within the meaning of section 2(d) of the Act. It is also not in dispute before us that it was reasonably 1 suspected of having

been stolen or unlawfully obtained. It is, not disputed therefore that two of the three essential requirements of section 3 were shown to exist at the time when the question of framing the charge came up for consideration. The question which remained for consideration was' whether it could be said that the accused were found or were proved to have been in possession of the railway property. It was therefore permissible for the prosecution to establish, either that the accused were "found" to be in possession of the railway property, or that they were provide "to have been" in possession thereof. As accused 1, 2, S and the absconding accused were not "found" in possession of the railway property, it was permissible for the prosecution to allege and prove that they had been in possession of that property, in order to attract the application of section 3. .

As has been mentioned, the allegation against accused 3 was that he purchased the seven tyres from accused 1 for Rs. 2700/- and removed them in his motor-lorry to Savda. It was further alleged that accused 3 produced four of those tyres from his motor-lorry and the three remaining tyres were found to have been sold to accused 4 and were seized from the possession. In view of this categorical allegation against accused 3 and 4, the High Court rightly directed that they should be charged for the offence under section 3 of the Act also. The appellant State has no grievance in so far as that direction of the High Court is concerned. Its grievance is that the High Court has taken the view that it was sufficient to frame charges under sections 379/34 and 461/34 I.P.C. against accused 1, 2, 5 and the absconding accused as in its view the allegation against them did not attract the application of section 3 of the Act.

It has to be appreciated that the allegation against accused 1, 2, S and the absconding accused was that they had removed the seven tyres from the Down Yard at Bhusawal railway station by breaking open the wagon. That was in fact the reason why they were charged for the commission of offences under section 379, 461 and 411 I.P.C. It is however an essential ingredient of the offence of "theft" that the movable property which was the subject matter of the theft should have been "moved" out of the possession of any person without his consent. As is obvious, that could be possible only if the person moving the property had taken it out of the possession of the person concerned and transferred it to his own possession in order to move it for the purpose of taking it dishonestly. It follows that transfer of possession of the property, however transient, is an essential ingredient of an offence of theft.

It was clearly alleged in this case that accused 1, 2, S and the absconding accused committed theft of the seven tyres by removing them from the wagon in the Down Yard of railway station Bhusawal. So when it was alleged that the accused were responsible for the removal of those tyres, it was thereby alleged that they had been in possession of those tyres for some period of time, even if it is assumed that they parted with them later on and left it for accused 1 to sell them to accused 3. The allegation against accused 1, 2, 5 and the absconding accused was therefore to the effect that they ' had been in possession" of the railway property in question, and that was sufficient to attract the application of section 3 of the Act. The High Court erred in taking the view that it was necessary, for the purpose of bringing a case under that section, to prove that the accused were found to be in possession of the railway property at the time of its seizure, and that it would not be attracted in the case of an allegation that the railway property was the subject matter of dacoity or theft by the accused. The High Court in fact went to the extent of upholding the argument that section 3 of the Act was meant

to meet a situation "analogous to the one for meeting of which section 124 of the Bombay Police Act has been enacted." That section relates to possession of property of which no satisfactory account is given by its holder. It is therefore the failure to account for the actual possession of the property found in the possession of the accused which constitutes an offence under section 124 of the Bombay Police Act. Unlike section 3 of the Act, that section does not go to the extent of penalising the accused where he is proved to "have been in possession" of that property. It is true that the gravamen of the offence under section 3 of the Act is the "possession" of the property, but it need not necessarily be a subsisting possession, and it is sufficient if the accused was proved to "have be in possession" of that property at any point of time.

In the view we have taken, the appeal is allowed, the impugned judgment of the High Court dated November 30, 1972, is set aside, and the trial court is directed to frame a charge under section 3 of the Act against accused 1, 2, 5 and the absconding accused in addition to the charge under sections 379/34 and 461/34 I.P.C. The accused are directed to appear in the trial court on September 3, 1979. The trial of the case has been considerably delayed and it should now proceed with expedition.

N.V.K. Appeal allowed.