

IN THE COURT OF DISTRICT & SESSIONS JUDGE, KAMRUP, GUWAHATI**Present :- Dr. (Mrs) I. Shah****Criminal Appeal No. 10 of 2011**

Appellant :

1. Sri Bishnu Barman
S/o Late Narendra Ch. Barman
R/o Vill- North Santi Nagar,
near Army Camp, Ward No.2
P.S.- Kokrajhar
Dist :- Kokrajhar (Assam)

-Vs-

Respondent : Union of India

Date of Argument on : 01-09-2011

Date of Judgment on : 12-09-2011

A D V O C A T E S

1. For the appellants : (1) Mr. Santanu Bora
(2) D.P. Mandal
2. For the respondent : (1) Rudra Hazarika
N.F. Rly

J U D G M E N T

This appeal is preferred against the judgment and order dated 09-12-2010 passed by Special Railway Magistrate, 1st Class, Kamrup, Guwahati in C.R. case No. 95 of 2005 convicting the appellant/accused U/S 3(a) of the R.P.(U.P.) Act, 1966, and sentencing him to undergo S.I. for three months.

The prosecution case in brief is that On 23-11-2005 at about 15:00 hours Sri Bimal Ch. Das, I.P.F/ FKM along with

other officers and staff conducted a search in the scrap godown on the accused Bishnu Barman. It is alleged that some railway articles i.e. Hamilton post 5 pieces in different sizes, for-way brackets 16 nos. in various sizes and overhead wire about 40 kg. were recovered from the godown. The accused failed to produce any documents in support of the recovery materials. The articles were thereafter seized. The case was registered. On completion of enquiry the Enquiry Officer submitted prosecution report U/S 3(a) of Railway Property (Unlawful Possession) Act, 1966 (in short R.P.(U.P.) Act.) against the accused. The accused pleaded not guilty to the charge framed against him U/S 3(a) of the Act and claimed to be tried.

The prosecution examined 5 (five) witnesses including the Enquiry Officer. Two witnesses were examined by the court as court witnesses. The accused in his statement recorded U/S 313 of Cr.P.C. denied all the allegations levelled against him. He declined to adduce any evidence. Learned trial court on conclusion of trial found the accused guilty and he was convicted and sentenced as stated earlier. The learned trial court on the basis of evidence adduced by P.W.-1 Purandar Das, then SE/Tele/FKM hold that the seized articles were used in railway over head communication and telecommunication. Learned trial court also observed that other railway materials namely Hamilton post 5 pieces in different sizes, for-way brackets 16 nos. and in various sizes and overhead wire about 40 kg were the railway property. The basis of conclusion of trial court is that the accused failed to produce any documents in support of the recovery materials. Learned trial court observed that it is not necessary that every railway material should have a railway mark on it. As P.W.-1 certified the

materials in questioned to be railway materials and that state sufficient to establish that those materials were railway materials. Learned trial court also relied on the statement the accused recorded while enquiry. He stated that he had purchased those materials from various farrywalas and he had not no knowledge that those materials were railway materials. It was in the evidence of P.W.-1 that Sri Ramchandra, Telecom Maintainer Kokrajhar informed him regarding theft of GI Wire 2 nos. of telephone posts from Fakiragram/Kokrajhar section. He issued a memo Ext.-1 in this connection. This Ramchandra Das was examined as court witness No.2. Ramchandra Das Stated that in the morning of 12-11-2005 while he was checking the railway trunk from Fakiragram to Kokrajhar he noticed that some telephone GI Wire were cut by some body and 2 nos. of telephone posts were also missing. The learned trial court observed that the seized materials in the instant case are similar to what were mentioned in the theft memo. The seized materials are telephone posts, GI Wire and for-way Brackets. Learned trail court observed that it is a matter of general knowingness that railway materials are not available in open market. And considering all the factors trial court believed that the seized materials must not have been acquired either by the accused or by other persons from whom the accused might have taken those material by unlawful means.

Assailing the judgment in findings of trial court learned counsel for the appellants have submitted that the evidence of court witness No.1 i.e. Krishna Nandi who was the only independent seizure witness is itself sufficient to acquit the accused.

Krishna Nandi was examined as court witness. Although he was cited as prosecution witness. He in his evidence stated that the railway police called him to the scrape shop of accused and took his signature as a witness. He further stated that he did not see the railway police seizing any article from the scrape shop of the accused. Learned counsel has further submitted that P.W.-1 who issued a certificate that the seized article were railway property is an interested witness. He is not an expert witness. He is the witness of fact and the prosecution has failed of prove recovery of any railway property in possession of the accused. The trial court failed to come to the right conclusion by drawing illegal presumption against the accused. In support of his contention the learned counsel has relied on the judgment in the case of *Latin Chandra Das another Vs State of Assam (1989) 2 GLR 18*.

Learned counsel for the respondent on the other hand has submitted that P.W.-1 in the Junior Sectional Engineer of Telecom communication Department under Railway. He examined the theft articles. P.W.-1 had been working about 18 years in the service so he can easily detect the article to be railway property. Reputing the argument of learned counsel of the appellant he submitted that in the cited case the theft was in respect of ***Basmati Rice*** which is a common commodity. But here in this case it is not a common commodity. The article recovered and seized are not found in market. Hence, this citation is not applicable. He further submitted that C.W.-2 confirmed that the property recovered from the possession of the accused was railway property. The judgment and order of conviction and sentence passed by the trial court is therefore proper and no interference needs and it should not be interfered.

Section 3 of the Act provides for penalty for unlawful possession for railway property it reaches Section 3 penalty for unlawful possession for railway property 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 comes into his possession lawfully is punishable. Railway property has been defined in Clause-D Section 2 of the Act as follows :

Railway property includes any goods money or valuable security or animal belonging to, or in charge or possession of railway administration.

In the cited case of *Latin Chandra Das (Supra)* Hon'ble High Court has observed that the definition of railway property makes it clear that in order to claim any property a railway property it must be proved that the property in question belong to the railway administration or was in charge or possession of railway administration it must be stolen at the relevant time. There are many properties belonging to railway administration which are disposed of by it from time to time by public auction or by various other means, the same being either unserviceable or circulars. These are purchased by various persons and thereafter they entered into the main distribution system and reached various individual who may by from then the marked in usual course of their personal use. Such goods may also even bear the railway emblem or other markets. There are also cases where the railway administration purchases goods from various private manufacturers and in course of supply in its some of the goods supplied as sub-standard or unsatisfactory. These goods also are disposed by

manufacturers in usual course in the market. These are some of the instances where property which may even bears some marks or sign to show that it was at one point of time railway property or intended to be railway property at the relevant time. It is for the prosecution to prove by positive evidence that the property was railway property and the accused persons was found in possession of such property. The burden of proof that the property was railway property does not on the accused. Once this burden is discharged prosecution is further require to prove that it could be reasonably suspected to have been stolen or unlawfully obtained. The expression reasonably suspected is vary significant. Suspicion implies a belief or opinion best on the facts or circumstances which do not amount to prove. Reasonably means in reasonable manner or consistently with reason. Thus the prosecution must have some facts or circumstances before it on the basis of which could acting in reasonable manner belief that the person concerned found in possession of such railway property might have stolen or unlawfully obtained the same. Such reasonable suspicion has to be proved before the court by the prosecution. Only thereafter, the onus is on accused to prove that the railway property came in to his possession lawfully. Section 3 of the Act does not require in all cases the accused person must to come forward and adduce evidence as to how the property in question was obtained by him. It is in fact a defence made available to the accused once the prosecution succeed to prove its case.

Here in this case, P.W.-1 Purandar Das identified the seized articles to be railway property. P.W.-1 has also deposed that Ram Chandra Telecom Maintainer Kokrajhar informed him regarding theft of GI Wire, 2 nos. of telephone

posts from Fakiragram-Kokrajhar Section. He issued the memo Ext.-1 in this connection. Ramchandra was examined as Court Witness No.2 and he corroborated the evidence of P.W.-1. Learned trial court has observed that the seized materials in the instant case are similar to what were mentioned in the theft memo. The accused could not account for material found in his possession. It is also observed railway materials seized from the possession of accused are not available in open market. The trial court rightly drew presumption that the seized materials must not have been acquired by lawful means.

The prosecution successfully discharged the spiral that the articles recovered from the possession of the accused were stolen railway property. The accused failed to prove that he obtained the property by lawful means.

In view of above, I find that there is nothing to interfere with the judgment passed by the lower court. However, admittedly the accused is a scrape vendor and it appears from the circumstances that he is receiver of the stolen property. There is nothing on record to show that he is convicted earlier in any case. Therefore the sentence to undergo S.I. for 3 months is modified and set aside. The accused shall pay a fine of Rs.5,000/-. In default he shall undergo S.I. for 3 months. With this modification the appeal is partly allowed. Send down the L.C.R.

Given under my hand and seal of this court on this 10th day of August, 2011.

Dictated & Corrected by me

Sessions Judge,
Kamrup, Guwahati

Sessions Judge,
Kamrup, Guwahati

10-09-2011

Both the parties are present. Today is fixed for judgment. Judgment is ready and delivered in the open court. There is nothing to interfere with the judgment passed by the lower court. However, admittedly the accused is a scrape vendor and it appears from the circumstances that he is receiver of the stolen property. There is nothing on record to show that he is convicted earlier in any case. Therefore the sentence to undergo S.I. for 3 months is modified and set aside. The accused shall pay a fine of Rs.5,000/-. In default he shall undergo S.I. for 3 months. With this modification the appeal is partly allowed. Send down the L.C.R. Detail judgment is given in the separate sheets.

Sessions Judge,
Kamrup, Guwahati