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(1954) 08 CAL CK 0005

Calcutta High Court

Case No: Criminal Revision No. 1504 of 1953

Sultan Khan APPELLANT

Vs

The State RESPONDENT

Date of Decision: Aug. 5, 1954

Acts Referred:

- Evidence Act, 1872 - Section 33
- Explosive Substances Act, 1908 - Section 5

Citation: 59 CWN 391

Hon'ble Judges: Mitter, J; Guha Ray, J

Bench: Division Bench

Advocate: S.S. Mukherjee and Kishore Mukherjee for the Petitioner, for the Appellant; J. Banerjee for the State, for the Respondent

Final Decision: Allowed

Judgement

Mitter, J.
The petitioner was tried before a learned Sessions Judge, sitting with assessors, upon charges u/s 5 of the Explosives Substances Act and Section 19(f) of the Indian Arms Act. The subject matter of the charges was a number of detonators which came both under the Explosives Substances Act and the Indian Arms Act. Under the latter Act, the detonators could be and were treated as ammunition. In respect of the charge u/s 5 of the Explosives Substances Act, the petitioner was convicted and sentenced to R.I. for one year; and in respect of the offence u/s 19(f) of the Indian Arms Act, the petitioner was also convicted and sentenced to one year. The sentenes were directed to run concurrently. It may be observed that the assessors were divided as to their verdicts in respect of both the charges in the proportion of two and two.

2. The petitioner''s appeal to the learned Sessions Judge was dismissed.

3. The prosecution case against the petitioner was briefly as follows:-

4. On the 11th August, 1952, consequent upon an information which the police received, some three rooms known as Dhaorahs in a colliery were searched by the police. The petitioner was said to have been in occupation of the middle room. The rooms were south-facing with a door to each facing south. There was a verandah to the south of these rooms. At the search were present a number of persons besides the police officers. The manager of the colliery P.W. 2 Baidya Nath Bag, one Amal Kumar Mitra, a Labour officer, and one Choto Prasad Roy were admittedly present at the premises when the police arrived. These three persons signed the search list and were treated as search witnesses. It appears further, that during the search some four or five persons other than the search witnesses and police witnesses, entered the middle room without having been searched. It was from the south-east corner o the middle room that the offending detonators were said to have been recovered by P.W. 7, the police officer who carried out the search. It appears lastly, that the accused petitioner though present on the occasion was found sitting outside on a Khatiah. The detonators were afterwards kept on a table in the verandah where the search list was prepared.

5. Upon the above allegations, the petitioner was placed upon his trial, then convicted and sentenced as aforesaid.

6. It appears to us that both the Courts below reached their conclusions as the guilt of the petitioner upon a consideration of a part only of the evidence. It is not disputed before us that not one of the non-police witnesses at the search either entered in the room in question, or saw the actual recovery of the offending articles from the south-east corner of the room. Yet all the three non-police witnesses were signatories to the search list which was prepared on the verandah after the search had been effected. Witness Choto Prasad Roy was examined before the committing Magistrate but was not produced before the Sessions Court on the ground that he was then not available. At the instance of the defence Choto Prosad Roy''s evidence before the committing Magistrate was tendered in evidence u/s 33 of the Indian Evidence Act. According to this witness''s evidence in the committing Court he remained in the verandah but did not enter any of the three rooms. He said that he saw some articles being brought out by the police, but was not sure from which room the articles were brought out. His evidence was that he saw the detonators and an air gun on the verandah. P.W. 5, Amal Kumar Mitra, the labour officer attached to the colliery, deposed to having been outside on the verandah. According to him, he could not, from where he stood, have a view of the south-east corner of the middle room from which the articles concerned were said to have been recovered. The other witness Baidya Nath Bag, P.W. 2, arrived at the commencement of the search but went away almost immediately and did not return until after the search had taken place. He too could not testify to any of the offending articles being recovered in his presence from the south-east corner of the room or at all. A police witness, namely, P.W. 3, though present on the occasion was not a signatory to the search list. According to a part of his evidence, P.W. 7, the police officer, who conducted the search, had informed him that the offending articles had been recovered from the south-east corner of the room. In his evidence in

chief, P.W. 3 merely spoke about the recovery of the articles from the middle room but did not condescend to any particulars to enable the Court to test the correctness of his evidence as to the discovery of the detonators.

7. Neither of the Courts below considered the above aspect of the case which was calculated to militate against the truth of the prosecution story, namely, that the articles had in fact been recovered from the south-east corner of the middle room. True, the evidence of the police witnesses, if believed, would suffice to found a conviction. It is to be observed, however, that the provision in the Code of Criminal Procedure for independent search witnesses, wherever such witnesses are available, has to be observed in order that there might be no doubt that the incriminating articles found their way into the room in question through extraneous agencies. This provision is important, not only for the purpose of connecting the accused with the possession of the incriminating articles, but also for the purpose of proving conscious possession on the part of the accused. It appears further that the Court of first instance was clearly influenced in his decision as to the guilt of the accused by the search list and the F.I.R. simpliciter. He treated these documents as affording evidence of the fact that the articles in question were recovered from the possession of the accused. At one place, the learned trial Court treated these documents as very important circumstantial evidence in support of the prosecution case. At the same time, the learned Judge was bound to admit that there was no evidence other than that of P.C. Ganguly, the police officer, who conducted the search as to the find in the south-east corner o the middle room of the detonators. Had the learned Courts below applied their minds to this aspect of the case, which we have discussed above, they might well have come to the conclusion that the guilt of the accused on the facts of this case had not been established beyond reasonable doubt. In our view, the infirmities of the prosecution, which we have pointed out, would entitle the petitioner to the benefit of doubt particularly in view of the fact that in the course of the search four or five other persons in fact entered the middle room without having been searched and then came out.

8. It is to be observed lastly, that the petitioner when examined u/s 342 of the Code of Criminal Procedure stated that not only was he not in possession of the room in question, but that a few Peswaris, with whom he had enmity, had turned up on the occasion, accompanied by policemen, and that, any one of them might have planted the detonators in question. There is no evidence on record to show who the other four or five persons, who entered the room in the course of the search were. In the foregoing circumstances, this application must be allowed. The petitioner who is now on bail is discharged from his bail bond. The Rule is made absolute.

Guha Ray, J.

9. I agree.