

Mahabir Sao alias Mahadeo Sao

Vs

The State of Bihar

Criminal Appeal No. 216 of 1968

(P. Jagmohan Reddy, D. G. Palekar JJ)

05.01.1972

JUDGMENT

PALEKAR, J. -

1. In this appeal by special leave the appellant, Mahabir Sao, has been convicted for the offence under Section 411, I.P.C. and sentenced to six months rigorous imprisonment. The conviction and sentence recorded by the learned Munsif Magistrate, Monghyr have been confirmed by the Sessions Judge in appeal. A revision application filed by the appellant to the High Court was summarily dismissed.

2. The case against the appellant was started on a complaint made by Major M. A. Subhan, P.W. 3, who was the Military Station Commander with his Headquarters at Jamalpur. On information given to him by Subedar Sayed Ismail, P.W. 4, he complained on June 27, 1965, to the Police Station at Jamalpur that three G.I. pipes (Galvanised Iron Pipes) were missing from the camp and some sweepers working in the camp were suspected of the crime. On the same day the Officer-in-charge of the Police Station S. I. Suraj Prasad, P.W. 8, recovered one pipe from the place of one Fakira, father of Saryug Yadav, P.W. 1, and two pipes from the angan of the house of the appellant. Saryug Yadav, P.W. 1, explained that he purchased the pipe from a person named Pooran on June 25, 1965. Thereafter the aforesaid Pooran and the appellant were challaned before the Munsif Magistrate, Second Class, Monghyr. Both Pooran and the appellant pleaded not guilty. Pooran was acquitted but the appellant was convicted under Section 411, I.P.C. and sentenced as above.

3. It is contended before us by the learned counsel for the appellant that there has been a grave miscarriage of justice because none of the courts cared to consider the appellant's contention that the two pipes attached from his angan were not Galvanised pipes but boiler pipes belonging to himself. It was the case of the prosecution that three Galvanised Iron pipes had been stolen and yet he has been convicted for being in possession of two boiler pipes which are absolutely different from Galvanised Iron pipes. In other words, the contention has been that the two pipes attached from the angan of the appellant were not stolen property at all and, therefore, the conviction under Section 411, I.P.C., could not be sustained.

4. That the above contention of the appellant had been put by him in the forefront is clear from the written statement which he had filed before the learned Magistrate. He specifically contended that the pipes attached from his possession were old boiler pipes or tubes and not Galvanised Iron pipes and since the prosecution case was that three Galvanised Iron pipes had been stolen the identity of the stolen articles had not been established. However, both the learned Magistrate and the Sessions Judge seem to have proceeded on the assumption that Galvanised pipes were recovered by the

police from the house of the appellant. The learned Magistrate commences Para 8 of his judgment with these observation :

"Admittedly the G.I. Pipes were recovered by Police from the house of Mahabir Sao in presence of P.W. 5 Bindo and P.W. 6 Karu Tanti."

Similarly the learned Session Judge commences Para 4 of his judgment with the following observations :

"There can be no dispute that a theft of three G.I. pipes had taken place from the camp of the Railway Engineers at Jamalpur. There is also no dispute that two G.I. pipes were recovered from the house of the appellant on the same day on which the theft had been reported on June 27, 1965."

It is obvious, therefore, that both the courts did not apply their mind to the question as to whether these pipes which are attached from the possession of the appellant were Galvanised Iron pipes or boiler pipes. There is evidence on record to show that boiler pipes are different from Galvanised Iron pipes as is clear from the evidence of Subedar Sayed Ismail, P.W. 4, on whose information the report had been made by his superior, Major M. A. Subhan, to the Police Station. He admits that Galvanised Iron pipes are different from boiler pipes. Yet he insists that the two pipes which are attached from the appellant's house were Galvanised Iron pipes. He was further asked whether the attached pipes were of the same diameter as the Galvanised pipes supposed to have been stolen which were described in the complaint as being 2 1/2" in diameter. He agreed that in the complaint they were described as being 2 1/2" in diameter and that the pipes actually brought in court were a little less than the same. He explained away the discrepancy by stating that the diameter was only approximately given. There is no substance in his explanation that the pipes were only slightly less in diameter because Major M. A. Subhan, P.W. 3, who had sent the complaint on the information given to him by Subedar Syed Ismail, P.W. 4, admitted after looking at the pipes in court that they were 'obviously' less in diameter than the third pipe in court though the allegation was that all the three pipes were of the same diameter. Now if the two pipes attached from the appellant's house were 'obviously' less than 2 1/2" in diameter, one is entitled to entertain a serious doubt as to whether those pipes were the same pipes about which the complaint had been lodged. Moreover, as admitted by the P.S.I. Suraj Prasad, P.W. 8, the attached pipes were old pipes and there was no distinctive mark on them to suggest that they were the two pipes which had been stolen. It is an admitted fact that such pipes are commonly sold in the market and that the appellant had other pipes also with him. In the circumstances we have no evidence except the ipse-dixit of Major M. A. Subhan and Subedar Syed Ismail that the pipes brought in court were the two pipes which had been stolen. In the case of a common article like a pipe which does not bear any distinctive mark and which, again, is shown demonstrably to have a diameter which is 'obviously' less than the one described in the complaint, it will be difficult to say that the property before the court was stolen property. This discrepancy is further strengthened by the fact that it is the case of the appellant that two pipes which were attached from his house were not Galvanised Iron pipes at all but boiler which are admittedly different from Galvanised Iron pipes. Indeed Subedar Sayed Ismail does not agree that the pipes before the court are boiler pipes or tubes. But there is other evidence to show that they are boiler pipes or tubes. Defence witness No. 1 Fekan Sahu who is a worker in the Jamalpur Workshop has definitely asserted that these are boiler pipes. He is a Supervisor in the Copper-Smith shop of the Railway Workshop and can be depended upon to know the difference between boiler pipes and Galvanised Iron pipes. That evidence finds support in the seizure memo Ext. 2/2 in which the P.S.I. and the panchas have described the same as follows :

"Two boiler pipes 15 feet long and 2 1/2" in diameter."

When the P.S.I. was asked to explain as to whether they were boiler pipes or Galvanised Iron pipes he fumbled and, though insisting that they were Galvanised Iron pipes, could not explain how the description 'boiler pipes' crept in the seizure memo. He pointed out that in the seizure memo he had also described them as G.I. pipes but that does not explain why he called them boiler pipes. All this clearly shows that the identity of the stolen property has not been established in which case it is difficult to see how the appellant could be convicted of the offence of receiving stolen property knowing or having reason to believe that it was stolen. The crucial points in this case for the courts to consider were : (1) Whether the two pipes in court were stolen property and (2) Whether the same had been attached from the possession of the appellant. If either of these points was not proved the offence could not be brought home to the appellant. The courts failed to apply their mind to this essential requirement of the offence before convicting the appellant and hence the appellant is entitled to be acquitted.

5. In the result the order of conviction and sentence is set aside and the appellant is acquitted. The two pipes attached from the appellant shall be returned to him.

</html