

Manaram Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Aug-25-1981

Reported in : 1982CriLJ696

Judge : M.B. Sharma, J.

Appellant : Manaram

Respondent : The State of Rajasthan

Judgement :

ORDER

M.B. Sharma, J.

1. Accused petitioner Manaram along with his son Bagdawatram was convicted by the learned Judicial Magistrate, First Class, Phalodi on Dec. 18, 1975 Under Section 9 of the Opium Act (hereinafter referred to as 'the Act') and each of them was sentenced to undergo three years' rigorous imprisonment and to pay a fine of Rs. 5,000/-, in default of payment of fine to further undergo six months' rigorous imprisonment. The learned Additional Sessions Judge No. 2, Jodhpur, who heard the appeal of the accused-appellant and his son, while maintaining the conviction reduced the sentence to two years' rigorous imprisonment and to pay a fine of Rs. 1000/-, in default of payment of fine to further undergo six months' rigorous imprisonment. The accused petitioner and his son both preferred a revision in this Court but the revision petition of the accused petitioner was admitted whereas the revision of his son Bagdawatram was not admitted. The son went to the Supreme Court but special leave to appeal was not granted.

2. In short the case of the prosecution is that Bhimasingh P.W. 7, Excise Inspector, Jodhpur (on Special Duty) along with Parbat Singh P. W, 1 Assistant Excise Inspector, preventive Force, Jodhpur, Mohan Prakash P. W, 2, Petrolling Officer, Preventive Force, Jodhpur and other staff of the Preventive Force and Jawansingh S. H. O. Lohawat raided the house of accused-appellant on July 13, 1972 at 9 a. m, in village Dhaka-ki-dhani, P.S. Lohawat. In the search conducted by the raid party in the presence of both the accused persons, 6kg. and 750 gms of opium in a bag was recovered from a room in the ground floor and from another room in the first story which was locked and the key of which was with Bagdawatram, opium was found spread over on the floor and was being dried. On collection it was found to be 16 kg. and 500 gms. Samples were taken and were sent to the Chemical examiner who in his report Ex. P. 7 dated May 15, 1973 reported as under:

On chemical examination the samples contained in the packets marked 1 and 2 were

found to be of opium having 9.35% (Nine point thirty five per cent and 7.43% (seven point forty-three per cent) Morphine respectively.

The report was signed by the Assistant Director. Chemical Section, Police Forensic Science Laboratory, C. I. D. Rajasthan, Jaipur.

3. The accused-petitioner and his son were tried Under Section 9 of the Act by the learned Sub-Divisional Magistrate, Phalodi but later on because of the separation of the Judiciary from April 1, 1974, the case was transferred to the learned Judicial Magistrate who after trial convicted the accused-petitioner and his son Under Section 9 of the Act. The plea of the accused-appellant in the trial court was that the opium was not recovered from his house,

4. The first contention of the learned Counsel for the appellant is that the prosecution has failed to prove that opium was recovered from the possession of the accused-petitioner. He submits that so far as opium allegedly recovered from the room in the first storey is concerned, it was locked and the key of it was with Bagdawatram the son of the petitioner and, therefore, it cannot be said that the father, had the knowledge of opium and in any manner dealt with it. It is also contended that so far as more than 6 kg. of opium which was recovered from a corner room in the ground floor is concerned, it is the house in which both the accused, father and son were living with ladies and other members. The accused-petitioner cannot be said to be in exclusive possession of opium. I am afraid this argument of the learned advocate does not impress me. It is not disputed that the house belongs to the father, and son also resided in it. Not only opium more than 6 Kg. was recovered from a corner room adjoining to the 'Baithak' (a place where the gents of the house sit) but more than 16kg. of opium was recovered from a room in the first storey which was spread on the floor and was being dried. In view of Section 10 of the Act in prosecution Under Section 9 of the Act it shall be presumed unless the contrary is proved that opium for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under this Act. Possession has been defined in 'encyclopaedic law dictionary' by Biswas, 1979 Edn. at p. 580 like this: Possession is the visible possibility of exercising physical control over thing coupled with an intention of doing so, either against all the world or against all the world, except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control, second, physical control is not possession unless accompanied by intention, hence if a thing is put into the hand of a sleeping person, he has not the possession of it. Third, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed. 'Jowitt's Dictionary of English Law 1959 Edn, defines 'possession' thus, there are two varieties of possession-real or actual possession and constructive or symbolical possession. The meaning of possession depends on the context in which it is used... possession need not be physical possession but can be constructive, having power and control over the gun.' The author has placed reliance on *Gunwantlal v. State* : 1972CriLJ1187 also. In *Inder-sain v. State of Punjab* : 1973CriLJ1537 dealing with Section 10 of the Act in para 18 their Lordships observed:

In our opinion Section 10 would become otiose if it were held that prosecution must prove conscious possession before it can resort to the presumption envisaged in the section. As we said Section 10 proceeds on the assumption that a person who is in any way concerned with opium or has dealt with it in any manner, must be presumed

to have committed an offence Under Section 9 of the Act, unless the person can satisfactorily prove any preponderance of probability either that he was not knowingly in possession or other circumstances which will exonerate him. The burden to account will arise only when the accused is in some manner found to be concerned with opium or has otherwise dealt with it.

Their Lordships further observed in para 20 as under:

In the last analysis, therefore, it is only necessary for the prosecution to establish that the accused has some direct relationship with the article or has otherwise dealt with it. If the prosecution proves detention of the article or physical custody of it, then the burden of proving that the accused was not knowingly in possession of the article is upon him. The practical difficulty of the prosecution to prove something within exclusive knowledge of the accused must have made the legislature think that if the onus is placed on the prosecution, the object of the Act would be frustrated.

I had occasion to deal with this authority in *Karamsingh v. The State* recorded in 1980 Cri LR (Raj) 592: 1981 Cri LJ NOC 123(Raj) and held that all that is required for the prosecution to prove by evidence is that the accused has dealt with the articles or has physical custody of the same, or is directly concerned with it. Once the prosecution shows this, the onus shifts on the accused and it is for him to prove by preponderance of probability that he is not knowingly possessing the article. I have also observed therein that necessary animus for an offence can also be inferred from the facts and circumstances of the case, in the instant case it is not only that more than 16 kg opium was recovered from a room which was locked and the key of which was with the son of the accused-petitioner but more than 6 Kg. of opium was also recovered in a bag from a room in the corner of the ground floor. Opium in the room in the first floor was spread on the floor and was being dried. Opium has its own characteristic scent and if about 23 kg. of it is kept in the house, the inmates are likely to know by its smell that opium is stored in the house. Under the circumstances it can be said that the accused-petitioner the father of Bagdawat-ram and the head of the family was concerned, with opium which was found in his house and, therefore, the prosecution having proved that the accused was concerned with opium and dealt with it, it was for the accused to have rebutted this presumption. Therefore, the first argument of the learned advocate has no force.

5. The next contention of the learned Counsel is that there is no evidence worth the name that opium as defined in Section 3 of the Act was recovered from His possession of the accused. A connecting argument has also been advanced that the report of the Assistant Director, Chemical Section, police Forensic Science Laboratory, Rajasthan Jaipur is not the report of the Chemical Examiner and, therefore, is not admissible in evidence Under Section 293 of the new Cr, P. C. which corresponds to Section 510 of the old Cr. P, C. I will first deal with the second limb of the argument about the admissibility of the report of the Assistant Director, Chemical Section Ex. p. 7, A look at Ex. p. 7 will show that the report is signed by the Ramesh Chandra, Assistant Director, Chemical Section, Forensic Science Laboratory, Rajasthan, Jaipur. The learned lower appellate court has placed reliance on Annaram's case reported in 1977 Raj LW 82 and has held that because it is not proved that the Assistant Director had been appointed as Chemical Examiner by the State Government, his report is inadmissible in evidence Under Section 510 of the old Code. But placing reliance on the statement of the witnesses of the Excise Department that the substance was opium from its smell and also from taste the

learned court upheld the conviction of the accused petitioner.

6. I have gone through Annaram's case. There is only a reference to that argument advanced by the learned Counsel for the accused in that case that the report was of the Assistant Director of the Chemical Section and it was not proved whether the Assistant Director was appointed as Chemical Examiner by the State Government. The learned Judge did not express any opinion on this argument. Under Section 510 of the old Code the report of any Chemical Examiner or Assistant Chemical Examiner was admissible in evidence. A look at the report Ex. p. 7 will show that Ramesh Chandra was the Assistant Director, Chemical Section of Forensic Science Laboratory, Rajasthan. Jaipur. Thus he was chemical examiner for the State Government and I do not find any force in the argument of the learned advocate that the report of the Assistant Director is not the report of the Chemical Examiner appointed by the State Government and could not be read in evidence. I do not agree with the learned Sessions Judge, that if having not been proved by the prosecution that the Assistant Director had been appointed by the State Government as Chemical Examiner his report is inadmissible.

7. Now I will take the first limb of the argument. The submission of the learned advocate is that even if the report of the chemical examiner is read, it does not prove that the substance recovered from the possession of the accused was opium. Section 3 of the Act which defines opium reads as under;-

3. Opium means - (i) the capsules of the poppy (*Papaver somniferum*)(whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom);

(ii) the spontaneously coagulated juice of such capsules which has not been submitted to any manipulations other than those necessary for packing and transports; and

(iii) any mixture, with or without neutral materials of any of the above forms of opium;

But does not include any preparation containing not more than 0.2 per cent of morphine, or a manufactured drug as defined in Section 2 of the Dangerous Drugs Act, (1930).'

8. The contention of the learned advocate is that merely because the Chemical Examiner has opined that the substance examined by him contained more than 0.2% of morphine the substance cannot be 'opium' within the meaning of Section 3 of the Act. According to him it was necessary for the Chemical Examiner to state that because of the percentage of opium which was more than 0.2% the substance was opium in any of the three forms. The learned advocate has made reference to *Bhairulal v. State* (1956 Rai LW 413 :1957 Cri LJ 237) where a learned single Judge of this Court observed (at p. 238).

As regards the nature of the article, there is no doubt that the prosecution has failed to prove that it was opium within the meaning of Section 3 of the Opium Act. In cases like the present, it is the duty of the prosecution to send the article in question to the chemical examiner for chemical examination because without it, it cannot be said as to how much percentage of the substance is there which would make its possession culpable.

That case was a case in which the conviction of the accused was based only on the evidence of Devisingh who said that from the smell the substance was opium. He did not say as to whether the article in question came in the first, second or third category as contained in Section 3 of the Act. In Annaram's case 1977 Raj LW 82) this Court observed that it is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be necessary. The learned Judge placed reliance on Baidya-nath Mishra v. State of Orissa, Criminal Appeal No. 270/1964 decided on 17-4-1964. 17-4-1967. The original citation is not available but the ruling is referred to in State of Andh. Pra, v. Boo-senna : 1967CriLJ1398 , In Baidyanath Mishra's case the question was as to whether the appellants were in possession of opium so as to make them liable for an offence. It was contended on behalf of the appellant in that case that the article seized from them was not opium as defined in the Opium Act, 1878. The only evidence relied upon by the prosecution was the evidence of the Prohibition Staff and the article had not been subjected to any chemical examination. While rejecting the contention advanced on behalf of the appellant in that case, their Lordships observed that;

It is true that opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. It is possible for people to identify opium without having to subject the product to a chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily Visible or capable of being apprehended by the senses that a chemical analysis may be necessary.

9. The learned advocate has referred to Bootasingh v. State of Punjab, 1980 Cr LJ 336 wherein dealing with the definition of 'opium' in Section 3 of the Act in a case in which the chemical examiner did not mention that the sample belonged to any of the categories mentioned in the three clauses of Section 3 of the Act, it was observed that the substance cannot be considered as 'opium' within the meaning of Section 3 unless it is proved that the substance also conformed to any of the forms of opium as specified in els. (i) to (Hi) of Section 3 of the Act. It was further observed that the chemical examiner only mentioned that the substance seized contained morphine but did not state in his report that the substance also belonged to any of the categories described in three els. of Section 3.

10. In the instant case as already stated earlier that the report of the Assistant Director Incharge of the Chemical Section of the Government is admissible in evidence Under Section 510 of the Cr.P.C. (old). In the report the Chemical Examiner has not said that the morphine contents in one sample were more than 9.35% and in the other 7.13%, but as will be clear from the report of the Chemical Examiner extracted above he has opined that the packets were found to be opium having 9.35% and 7.43% morphine respectively. He has nowhere said that only on account of morphine percentage being more than the prescribed the substance contained in the packets was 'opium'. That apart, a look at Ex, P. 7 further shows that the packets which were sent to the Chemical Examiner contained solid dark brown coloured substance. Therefore, to my mind when the chemical Examiner says that a particular sample sent to him for analysis was 'opium' he says that it was 'opium' within the meaning of Section 3 of the Act. Merely because he does not say as to under which of the three categories the sample falls it cannot lead to an inference that the substance is not 'opium' and it cannot be said that the prosecution has failed to prove that the substance recovered from an accused person is 'opium'. With due respect I do not

agree with the observations made in Bootasingh's case 1980 Cri LJ 33g)(Punj.). Thus even from the report of the Chemical Examiner the substance recovered from the accused was opium.

11. It may also be stated that there is evidence on record that by smell also it has been held to be 'opium'. There is material on record consisting in the statements of Parbatsingh P.W. 1 who was Assistant Excise Officer, Preventive Force, Jodhpur. He has clearly stated that from smelling the substance he came to know that it was opium. He is an Excise Officer having eight years' experience in the branch. P.W. 2 Mohan Prakash, the other Excise Officer has stated to the same effect and similar statement has been made by Bhimasingh P.W. 7 another Excise Inspector, I have already said that it was solid substance found in quantity of about 23 Kg. from the house. There is no reason to disbelieve the statement of the Excise witnesses having experience that from smell and taste the substance was 'opium'. I can do no better than again refer to the observations of their Lordships of the Supreme Court in Boosenna's case 1967 Cri LJ 1398) wherein the ease of Baidyanath Mishra was referred to. Therefore, viewed from any angle I am of the opinion that the prosecution has proved beyond doubt that the substance recovered from the possession of the accused was 'opium' within the meaning of Section 3 of the Act.

12. Though a sentence of two years and fine was awarded to the accused-appellant as well as to the son and the sentence awarded to his son has been upheld by this Court but looking to the fact that the accused is an old man I consider that the reduction of sentence is called for.

13. In the result, the revision is dismissed on merit but I modify the sentence and the accused-petitioner is sentenced to undergo one year's rigorous imprisonment or to pay a fine of Rs. 1000/- in default of payment of fine further suffer one month R. I Under Section 9 of the Act. The accused is on bail and he shall surrender forthwith in the trial court. In case he does not surrender the trial court shall take steps so that the accused undergoes the sentence or any remaining part thereof.