

**Abdul Samad Vs. the State**

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**Court :** Guwahati

**Decided On :** Apr-20-1951

**Judge :** Thadani, C.J. and Ram Labhaya, J.

**Appellant :** Abdul Samad

**Respondent :** The State

**Judgement :**

**Ram Labhaya, J.**

1. Abdul Samad, the petitioner in this case, was found guilty under Section 5(a), Assam Opium Prohibition Act, 1947, by Mr. R. Medhi, Magistrate, 1st Class, Jorhat. He was sentenced to undergo R. I. for 5 years & was also ordered to pay a fine of Rs. 2,000/- & in default of payment of fine to undergo R. I. for another year. Abdul Rahman & Abdul Rashid were also found guilty under Section 5 (a) of the Act. Alladit, who was tried along with Abdul Samad & others, was found guilty of abetment. On appeal, the conviction & the sentence passed on Abdul Samad were upheld. Others were acquitted. Abdul samad has challenged the legality & the propriety of his conviction by this revision petition.

2. The prosecution case was briefly as follows: On 30-5-1948, Abdul Rashid came to the Gatanga Post Office. He made inquiries from the Post master about parcels addressed to Mr. Han-ray. He told the Postmaster that these parcels had been despatched from Calcutta. These parcels had not reached Gatanga Post office

then. On 31-5-1948, Abdul Rahman came to the Post Office & inquired whether those parcels had reached or not. The parcels had not reached even till then, On 1-6-1948, Abdul Samad, the petitioner before us, visited the Post Office. He also inquired about the parcels. These parcels had reached the Post Office by that time. Abdul Samad came to the Post Office at about 9 A. M. He showed the Postmaster the original postal receipts showing the despatch of the parcels from Calcutta. These receipts had the same postal numbers as the parcels. The Postmaster, P. W. 3, declined to deliver the parcels without the signature of the addressee on the postal intimations that he was to issue & asked Abdul Samad to bring the addressee to the Post Office to sign them personally or to have the intimations signed by him. Abdul Samad left the Post Office with the receipts. He told the Postmaster that he would come back again at about 12 noon for taking delivery of the parcels. At about 7 P. M. that day, the petitioner along with Abdul Rahman & Abdul Rashid came to the Post Office in Alladit's car. They talked to the Postmaster & pressed for the delivery of the parcels to them. The Postmaster gave them 5 postal receipts duly filled in for the signature of the addressee. He was informed by the accused that Mr. Hanray, the addressee, was an Engineer on the Rowraiah Air Field & he could not attend personally. The petitioner with his companions then left the Post Office.

3. Mr. Thomas, Special Inspector of Excise, got scent about these parcels. He saw the Postmaster on 1-6-1948 before the parcels were received in the Gatanga Post Office. He told the Postmaster that some suspicious parcels were coming from Calcutta & that they may contain opium & requested him not to deliver the parcels without informing him. He himself remained in hiding in an adjoining room of the Post Office. He remained there practically the whole day. After Abdul Samad & his companions had left the Post Office, the Special Inspector of Excise (Mr. Thomas) came out & asked the Postmaster as to the talk that he had with Abdul Samad & his companions. The Postmaster also told him that the accused were likely to come next day for obtaining delivery of the parcels. The Inspector appeared again next day & stayed in the adjoining room of the Post Office from where he could not be seen. At about 4 P. M., Alladit's car came with the petitioner & his companions. They got down from the car & went inside the Post Office. Abdul Samad tendered the receipts, Exs. 4 to 8, purporting to have been signed by Mr. Hanray. He also

produced on demand by the Postmaster the original postal receipts of the Calcutta office bearing the postal marks of Theatre Rd. Post Office. These were Exs. 11 to 15. They showed despatch of the parcels received at Gatanga. The Postmaster placed the parcels on the counter which the 3 accused persons picked up. The parcels were 5 in number. The Excise Inspector came out of his hiding. He sent for the Manager of the Gatanga T. E. The parcels were opened & they were found to contain 26 opium cakes weighing about 15 seers. A seizure list was prepared & Abdul Samad with 3 others were sent up for trial. The petitioner was found guilty of importing opium.

4. We have heard his learned counsel. We think that the charge has been fully substantiated against him. He made inquiries about the parcels. He produced the postal receipts showing the despatch of these parcels from Calcutta. He also produced the postal receipts purporting to have been signed by the addressee Mr. Hanray, These facts have been proved beyond any reasonable doubt by the statements of Mr. Thomas, P. W. 2, & the Postmaster, P. W. 3.

5. The fact that Abdul Samad produced the Calcutta receipts showing the despatch of the parcels indicates that he had a hand in getting these parcels despatched from Calcutta, He may not have gone to Calcutta office with the parcels but it is clear that he was interested in their despatch & had the receipts in his possession. The parcels were addressed to Mr. Hanray. He has not been produced. It has not been shown that the Postmaster knew any person of the description of the addressee. As found by the Courts below, the addressee appears to be a fictitious person. If he was an Engineer as stated by Abdul Samad to the Postmaster, it should have been easy to produce him or at least to establish his existence. The defence set up by Abdul Samad is not at all convincing. He pleaded that he had gone to the Post Office to realise his dues from the Postmaster for cloths supplied to him. There is nothing in the circumstances of the case to suggest that the Postmaster had any reasons for implicating him falsely. The circumstantial evidence consisting of the receipts issued by the Calcutta Office points to the conclusion that Abdul Samad was a party to the importing of opium found in the parcels seized by the Excise Inspector on 2-6-1948. The conclusion arrived at by the Courts below that Abdul Samad was guilty of

importing opium from outside the Province is fully borne out by the evidence & we see no reason to differ from it.

6. The learned Counsel has also urged that the Magistrate who found the accused guilty & convicted him under Section 5(a), Assam Opium Prohibition Act, 1947, had not recorded all the evidence in the case. This he argues has prejudiced the accused & therefore it is a fit case in which a retrial may be ordered under proviso (b) of Section 350(1) of the Cr. P.C. We are not satisfied that any prejudice has been caused to the accused. Three prosecution witnesses were examined before the case was transferred on 4-1-1949. The proceedings in the trial Court continued for about a year, after the transfer of the case. The final order was passed by the Magistrate on 22-11-1949. The accused were represented in the trial Court & did not demand a de novo trial. The petitioner was also represented in appeal & the plea that he was prejudiced by the fact that part of the evidence had been recorded by a Magistrate other than the one who found the petitioner guilty was not raised in the lower appellate Court. It was not raised even in the grounds of revision & we are not at all satisfied from the facts of the case that there was any prejudice caused to the accused.

7. The view of the learned Counsel that it was obligatory on the part of the Magistrate to ask the accused if he wished to have a de novo trial, does not find any support from the language of proviso (a) to Section 350(1) of the Cr. P.C. All that the proviso lays down is that:

In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned & re-heard.

The right is given to the accused. It is open to him to demand that witnesses or any of them be re-summoned & re-heard. There is no obligation cast on the Court to ask him if he wants to exercise the privilege conferred on him by proviso (a) to Section 350(1). It may be desirable & even proper for the Court to bring to the notice of the accused the privilege that the law confers on him. But the omission to do so does not involve any deviation or departure from a statutory rule of procedure. If the omission is characterised as an irregularity, it would stand cured

in the absence of any prejudice.

8. We do not think there is any Justification for ordering a retrial having come to the conclusion that there is no basis for the view that the accused has been prejudiced in this case by the fact that part of the evidence was heard by a Magistrate other than the one who passed the order of conviction. The learned Counsel has also argued that the sentence is excessive. The opium recovered from the accused was 15 seers. The quantity suggests importing on a large scale. The sentence, we think, is appropriate & no interference is called for.

9. The petition of revision is dismissed & the Rule discharged.

Thadani, C.J.

10. I agree.

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