

**Prem Chand Roy Vs. the State**

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**Court :** Guwahati

**Decided On :** May-17-1957

**Judge :** Sarjoo Prosad, C.J. and H. Deka, J.

**Appellant :** Prem Chand Roy

**Respondent :** The State

**Judgement :**

Sarjoo Prosad, C.J.

1. The petitioner in this case has moved for setting aside his conviction Under Section 5(a) of the Assam Opium Prohibition Act of 1.947 (Act XXIII of 1947), under which he has been sentenced to rigorous imprisonment for two years and a fine of Rs. 500/-, in default to undergo rigorous imprisonment for another six months,

2. The. prosecution case is that on 13-6-54, Sri G, C. Datta, Special Assistant Excise Inspector of Lumding (P.W. 6), who was on duty at the Lumding Railway Station with other members of his staff, noticed the petitioner getting down from the 513 Up Passenger Train when it steamed into the station at about 1 A.M. in the morning. On getting (liowo, the petitioner summoned two porters to carry his luggage which consisted of a mango basket, a hand-bag and a bedding. The hand-bag and the bedding were carried by one porter while the mango basket was carried by another. The Excise Officer challenged the petitioner and wanted to

search his effects.

Nothing incriminating, however, was found on a search of the handbag and the bedding, but when the officer wanted to search the mango basket, the petitioner obstructed him in doing so. The Excise Officer then took the petitioner to the Ticket Collectors' office along with the mango basket in question which, on being searched, was found to contain two packets of opium weighing one seer, which were recovered from inside the basket. The officer then seized the opium and sealed it in the presence of some search witnesses, and reported the matter to the- Inspector of Excise, Special Branch, who in due course sent up the petitioner for trial under the aforesaid Section of the Opium Act.

3. The petitioner pleaded not guilty to the charge. His defence in the main was that the mango basket frame which the opium in question was recovered, did not belong to him, but that it belonged to some other passenger who had engaged the porter concerned (P.W. 5) for carrying the same, and that when the petitioner was challenged by the Excise Officer, the other man who had engaged the porter, vanished in the crowd,

4. In support of the prosecution case, a number of witnesses were examined, and the Courts below, which had to examine the evidence in the case, concurrently held that the guilt of the petitioner had been proved. They found that the mango basket in question did belong to the petitioner, and that the opium which was recovered therefrom, was in his conscious possession. They accordingly convicted the petitioner and sentenced him as stated above.

5. Mr. Ghose on behalf of the petitioner, urged firstly, that Section 5 (a) of the Opium Act, on which the conviction was based is repugnant to the Central Act, namely, the Opium Act of 1878 (Act 1 of 1878), inasmuch as the sentence provided Under Section 9 of the Central Act is imprisonment for a term which may extend to one year only, whereas the sentence provided Under Section 5 (a) of the Assam Opium Prohibition Act (Assam Act XXIII of 1947) is very much severer, namely, imprisonment of either description for a term which may extend to six years, and with fine which may extend to five thousand rupees.

Mr. Ghose for the petitioner concedes that the item 'opium' is in the Concurrent List and was so in the Concurrent List even under the Constitution Act of 1935, and, as such, both the State Legislature as also the Central Legislature had and have jurisdiction to legislate on the point. His submission is that the Central Legislature having already legislated on the matter, any legislation by the State Legislature which was repugnant to the Central Act, could not prevail to the extent of its repugnancy.

This argument, however, does not take notice of the provisions of Section 107(2) of the Government of India Act, 1935 or of Article 254(2) of the present Constitution. The Assam Act in question (Assam Act XXIII of 1947) was passed on the authority of the Government of India Act, 1935, and it received the assent of the Governor-General on 14-1-1947. That being so, it is the subsequent legislation, namely the provisions of this Assam Act of 1947, which will prevail. Section 107(2) of the Government of India Act, 1935, provides:

Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision, repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General, has received the assent of the Governor-General, the Provincial law shall in that Province prevail....

I have omitted to refer to the other parts of the Section which have nothing to do with the present case. Here, the legislation had received the assent of the Governor-General. That being so, it is Quite obvious that it is the Assam legislation which will prevail; and, therefore, the conviction Under Section 5(a) of that Act could not be impugned on that ground. Article 254(2) of the present Constitution is to the same effect, and it also provides that where a law made by the Legislature of a State with respect to any of the matters enumerated in the Concurrent List, contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State, shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State, Therefore, even

though there may have been some conflict between Section 9 of the Central Act (Act I of 1878) and Section 5 (a) of the Assam Act (Act 23 of 1947) as to the measure of punishment, it is the latter Act which will prevail so far as this State is concerned.

6. Mr. Ghose then contends that the law gives a discretion to the State Government to prosecute a person either under the Central Act Or under the State legislation, in which case, a person prosecuted under the latter Act is placed in a prejudicial position inasmuch as the Court, in such circumstances, is empowered to inflict a severer sentence on him] than what is warranted by the Central law. He, therefore, contends that it violates Article 14 of the Constitution. In support of his contention, he has referred to a decision in *Ram Kissen Chandgothia v. State of West Bengal* 56 Cal WN 659 : A.I.R. 1952 Gul 639.

It would be out of place to refer to the details of that decision because, in our opinion, the decision has got no application to the facts of the present case. As I have already pointed out earlier, in this case, it is not a fact that the State Government has discretion to prosecute a person under two different types of legislation in regard to the same offence. As a matter of fact, under the provisions of the law, to which I have referred, it is obvious that the prosecution of the person concerned in this State could only be under the provisions of the Assam Act (Act 23 of 1947) when the provisions of the earlier Central Act (Act I of 1878) were inconsistent with those of the latter Provincial Act.

It is also well known that even under Article 14 of the Constitution of India the State Legislature is not prevented from making laws which may be necessary to meet the demands of special classes of cases or special exigencies in any particular territory. For instance, the act of smuggling in any particular territory may be so notorious that it may require a special legislation to meet such offences and to stop the evil.

Chief Justice Patanjali Sastri pointed out in *Kathi Railing Rawat v. State of Saurashtra* : 1952 CriLJ805 that the Ordinance impugned in that case having been passed to combat the increasing tempo of certain types of regional crime, the two-fold classification on the lines of type and territory adopted in the impugned

Ordinance, read with the notification issued thereunder, was reasonable and valid, and the degree of disparity of treatment involved was in no way in excess of what the situation demanded. We, therefore, do not feel justified in entertaining the contention advanced by the learned Counsel.

7. Mr. Ghose then argued that on the merits, the conviction of the petitioner could not be sustained. Ordinarily, where there are concurrent findings of fact arrived at by the Courts below, this Court, in revision, would be reluctant to enter into the evidence, and it is only where the circumstances are such as to rouse the conscience of the Court and induce it to consider the evidence that it is prepared to do so. In the present case, Mr. Ghose has placed the judgments of the two Courts below before us and contended that a large part of the prosecution evidence had been discarded by those Courts, and that the conviction of the petitioner substantially rested upon the evidence of only one witness, namely, the Special Assistant Excise Inspector (P.W. 6).

We, therefore, considered it necessary to examine the evidence for ourselves, and we are satisfied that the two Courts below were correct in accepting the evidence of this witness (P.W. 6), supported as it was by the evidence of another witness, Debi Prasad Banik (P.W. 7); even though they were careful enough to exclude from their consideration the evidence of the other witnesses for the prosecution. The evidence of Debi Prasad Banik is to the effect that he saw the accused petitioner getting down from the train, and that he noticed that the latter had one bedding and a basket of mangoes carried by two porters; on a search of the bedding, the Excise Officer found nothing incriminating therein. But that on a search of the mango basket, the Officer found and recovered opium therefrom.

The witness also signed the seizure-list. The evidence of the Excise Officer is to the effect that he saw the accused petitioner taking two porters while getting down from the train. One of the two porters carried a mango basket and another a hand bag and a bedding. He searched the bedding and the hand-bag, but found nothing incriminating therein, but when he tried to search the mango basket, the accused petitioner obstructed him, therefore, he had to take the accused to the Ticket Collectors' office and there, after search, recovered the opium in question, and

packed and sealed it in presence of search witnesses,

The circumstance that during the search of the hand-bag and the bedding the other porter did not leave the side of the petitioner, also supports the evidence of this witness that the two porters were engaged by the accused. The porter who carried the mango basket was examined in chief, but he was not available for cross-examination, and, therefore, the two Courts below have rightly not placed any reliance upon his testimony. It is explained on behalf of the petitioner that his obstruction was merely in the sense that the mango basket did not belong to him. But it does not appear, on a reading of the depositions, that the obstruction was merely in that sense; on the other hand, the obstruction appears to have led the Excise Officer to take the accused to the Ticket Collectors' office for conducting a proper search of the mango basket.

In a way, we think that the evidence of the Traveling Ticket Examiner (P.W. 1) also corroborates the evidence of the other two witnesses already mentioned. The Ticket Examiner has made some discrepant statement about the mango basket and that part of his statement has been rightly discarded. He, however, says categorically in his evidence that he saw the accused putting the mango basket on the head of the porter and getting down from the train, when the Excise Officer challenged him. This part of his deposition has not been shaken. That being so, we are satisfied that the two Courts below had taken a correct view of the evidence when they held, on the evidence in question, that the guilt of the accused petitioner had been adequately establish We, therefore, think that the conviction and sentence of the petitioner is justified, and we see no reason to interfere. The Rule is accordingly discharged.

**Deka, J.**

8. I agree

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