

**Abdul Ali Vs. the State**

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**Court :** Guwahati

**Decided On :** Mar-13-1950

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

**Appellant :** Abdul Ali

**Respondent :** The State

**Judgement :**

**Ram Labhaya, J.**

1. The petition of revision is directed against the order of the learned Sessions Judge, U. A. D., by which the petitioner's appeal against his conviction and sentence Under Section 5(a) of the Assam Opium Prohibition Act, 1947, was dismissed. The petitioner was sentenced to undergo rigorous imprisonment for 2 years and a fine of Ba. 600 in default to rigorous imprisonment for 6 months.

2. The house in which Abdul Ali, petitioner, lived was searched on 6th January 1949. An elder brother, Abdul Savan and a younger brother, Abdul Mannan of the petitioner also lived in the same house. The Excise Sub-Inspector, who conducted the search, recovered one seer of opium from the house. There were two cakes each weighing half a seer. They were found in two brass utensils wrapped in brown paper. The two utensils were covered by a half-pant. They were placed inside the hollow of a Murah, The Murah itself was under a table in an inner room of the house occupied by the petitioner and his two brothers, Abdul Suvan, the

eldest, absconded. Abdul Ali, the petitioner and Abdul Mannan were sent up for trial. Both were found guilty Under Section 5 (a), Assam Opium Prohibition Act by the Magistrate, 1st class, Dibrugarh.

3. On appeal, Abdul Mannan was given the benefit of doubt but the conviction of Abdul Ali was maintained. In upholding the conviction, the learned Judge remarked that in his opinion the petitioner had definite knowledge of the existence of opium inside his house.

4. In the trial Court, as also before the learned Sessions Judge, one plea raised was that opium had been planted in the house by some one. The learned Counsel for the petitioner has not pressed this plea before us. The circumstances under which the opium was recovered, its quantity, the place where it was kept and the manner in which it was deliberately concealed, all lead irresistibly to the conclusion that planting was completely out of question. The learned Counsel has raised only one contention. He argues that the mere fact that opium was recovered from the house in which the petitioner lived was no evidence or proof of the fact that the accused was in possession of the opium. There was nothing for him, therefore, to account for Under Section 28 of the Act. There is considerable force in this contention.

5. Section 3, Assam Opium Prohibition Act, 1917, prohibits import, export, transport or possession of opium amongst other things. Section G (a) punishes contraventions of Section 3. Under Section 5 (a) possession of opium is punishable. Anyone found in possession of opium in Assam is liable to punishment with imprisonment of either description for a term which may extend to 6 years, and with fine which may extend to Rs. 5000. Obviously this is a very serious offence in this province. The question is what is meant by the word 'possession' which is made punishable by the Act.

6. We think 'possession' implies dominion and control. A person cannot be said to be in possession of an article if he is not in a position to exercise any dominion over it. The exercise of dominion would be possible only if there is knowledge of its existence or presence at a particular place. Knowledge or consciousness of the existence of the article at a place where dominion could be exercised would

therefore be necessary to constitute possession. A father, living in a house with half a dozen sons, may not know what his sons or a particular son may bring to the house. Anyone of them may bring some quantity of opium. It may be placed in some part of the house which though accessible to all is not frequented. The father and the other inmates of the house may be wholly unaware of its existence. They would not be in a position to exercise dominion or control over it. They could not be said to be in such possession as the law seeks to punish. There would be no mens rea or guilty knowledge.

7. Possession of opium within the meaning of Section 5 (a), therefore, must imply knowledge. It must be conscious possession making some kind of control possible, or in other words, there must be mens rea or guilty knowledge before a person could be convicted of an offence Under Section 5 (a) for possessing opium. There would not be any culpable possession if there is no knowledge on the part of an occupant of a house or room as to the existence of opium in the house or the room as the case may be.

8. Opium Act of 1878 also prohibits possession of opium. In a Division Bench of the Calcutta High Court, reported in *Cyril G. Baiter v. Emperor* A.I.R. (17) 1930 Cal. 668 : 32 Cr. L.J. 245, it was held by their Lordships that:

Possession implies knowledge, and there would be no possession when there is no knowledge on the part of the ostensible occupant of the cabin or room ' as the case may be

9. In *Emperor v. Santa Singh* A. I. R. (31) 1941 Lah. 839 : 46 Cr. L. J. 1 F. B, a Full Bench of the Lahore High Court held that possession of an unlicensed arm or ammunition within the meaning of Section 19(f), Arms Act meant something more than mere constructive or legal possession. Possession necessary for constituting an offence Under Section 19 (f), meant conscious possession.

10. The view as to the meaning and connotation of the word 'possession' as occurring in the Opium Act of 1878 was followed in *Bholanath v. The King* A.I.R. (86) 1949 Assam 73 : 61 Cr. L. J. 61. It was held, in the circumstances of that case, that the knowledge of the presence of opium in the house of the accused

could be properly attributed to him and therefore it was for the accused to account satisfactorily for his possession Under Section 10 of that Act. This knowledge was considered an essential ingredient of the offence. There can be no doubt that the word 'possession' in the Assam Opium Prohibition Act also means conscious possession. There is nothing in the context to indicate that it can be given a different meaning for the purpose of this Act. The person charged with the possession of opium must be shown to have knowledge of the existence of the opium in his house before he can be said to be in possession of it. Mere recovery of opium from a house in which he lives along with other persons would not be sufficient to show that he was in possession with knowledge of its existence.

11. The learned advocate for the State has referred us to Section 28, Assam Opium Prohibition Act. This section lays down that:

Id trials under clauses (a) to (c) of Section 5, it shall be presumed, unless and until the contrary is proved, that the accused has committed the offence -with which he is charged in respect of the opium for the possession of which he fails to account satisfactorily.

12. The learned Counsel urges that the opium having been recovered from the house of the accused, it should be presumed to be in his possession and further by reason of the statutory presumption created by Section 28, it should be for the accused to explain this possession.

13. We do not think this interpretation of the section is correct. Under Section 53, the accused has to explain his possession. But if he has not been shown to be in possession, there is nothing which is to account for. The word ' possession appears in SB. Section 6 and 28 of the Act. In all these sections, the meaning to be attributed to it ought to be the same, unless the context in a particular section indicates a contrary intention. If possession ought to be conscious, then before the presumption Under Section 28 comes into operation, conscious possession on the part of the accused has to be proved by the prosecution. Where such possession is not proved, no presumption arises in favour of the prosecution. The burden of proving conscious possession on the part of the accused remains on the prosecution and that burden is not shifted to the accused by anything that is

contained in Section 28. The contention of the learned Counsel would be correct if Section 28 had provided that it shall be presumed unless and until the contrary is proved that the accused has committed the offence with which he is charged in respect of the opium recovered from the house in which he resides. This is not what the law lays down and all this cannot possibly be read into Section 28.

14. Section 10, Opium Act of 1878 is a provision analogous to B, 28, Assam Opium Prohibition Act. It provides that:

In prosecutions Under Section 9, it shall be presumed, until the contrary is proved, that all 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.

Under Section 9, a person if found in possession of opium is liable to prosecution. Statutory presumption as held in *Cyril C. Baker v. Emperor* A. I. R (17) 1930 Cal. 668 : 32 Cr.L.J. 245 can be availed of by the prosecution only if conscious possession of opium on the part of the accused is proved.

15. We do not think a different interpretation can be put on Section 28 of the Assam Act, nor can the word 'possession' occurring in Section 28, be 'given a different meaning from that which it must have Under Section 5 (a) and therefore by virtue of this section the prosecution cannot claim that mere recovery of opium from a particular house casts an obligation on every adult occupant of the house to account for it or that it is proof presumptive of the guilt of every one re-siding in the house.

16. It is conceded that apart from the recovery of opium from the house, there is no other evidence against the accused showing that he had any hand in bringing or placing the opium there or that he had any knowledge of its existence.

17. We think, therefore, that there was no basis for a finding that the petitioner was in conscious possession of the opium or that he had knowledge of its existence in the house. His conviction, therefore, is not sustainable. The petition of revision is allowed. The conviction is quashed and the petitioner acquitted. He shall be released forthwith. The fine, if paid, shall be refunded.

Thadani, C.J.

18. I agree.

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