

State of U.P. Vs. Mata Prasad

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Court : Allahabad

Decided On : Feb-19-1974

Reported in : 1974CriLJ868

Judge : K.B. Srivastava and ;D.N. Jha, JJ.

Appellant : State of U.P.

Respondent : Mata Prasad

Judgement :

K.B. Srivastava, J.

1. This is a State Appeal against the order of acquittal of the respondent Mata Prasad on a charge under Section 9. Opium Act. The appellant was convicted under that section by the Sub-Divisional Magistrate, Salon and sentenced to undergo rigorous imprisonment for a period of three months. The prosecution case was that on a search of his person taking place at about 2 P. M. on April 23. 1969. 200 grains of opium were recovered from the folds of his Dhoti. This opium was sent to the Chemical Examiner who confirmed that it was opium but also indicated that the quantity sent was not sufficient to enable him to give any opinion as to the percentage of morphine therein. The learned Magistrate on the appraisal of the evidence on record came to the conclusion that the stuff was recovered from the possession of the respondent and that the stuff was opium. On appeal, however, after confirming the finding of recovery, the learned Sessions Judge took the view

that the stuff recovered was not opium and that is the reason why he recorded an order of acquittal.

2. We have heard the learned Counsel on both sides and we have no hesitation in confirming the finding of the recovery of the stuff from the possession of the respondent on the date and at the time and place indicated by the prosecution. This, therefore takes us to the next important question, that is to say. whether the commodity was opium or something else. The word 'opium' has been defined by Section 3 of the Opium Act as follows:

Opium means:--

(i) the capsules of the poppy (*Papa-ver somniferum* (L) whether in their original form or cut, crushed, 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 transport 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.

It has been seen above that while the Chemical Examiner, after the necessary chemical analysis, gave the opinion that the stuff was opium, he proceeded further to state that the quantity supplied was insufficient to enable him to give an opinion as to whether the morphine content was more or less than 0.2 per cent. It is on this latter part of his opinion that the decision of the learned Judge turned. However we are of the view that this finding on the question of law was erroneous. Their Lordships of the Supreme Court have observed in *Baidyanath Mishra v. State of Orissa* 1968 All WR 84 (SO, that the question of 0.2 per cent of morphine does not arise in connection with the 2nd clause of the definition to which the opium in that case obviously belonged. It refers to a preparation which means a mixture

with or without neutral materials containing any other two forms of opium). In *State of Madhya Pradesh v. Kanhavalal* : AIR 1964 MP11 it was observed that in order to consider the question whether a given stuff was opium or not, regard has to be had to its definition under Section 3 of the Opium Act; and having regard to the definition whether a particular article seized and alleged to be opium is so or not will depend upon whether it answers one or the other of the description given in the three clauses of the definition. The Division Bench proceeded to hold that in the majority of cases when seizure of opium is alleged it means in common parlance opium falling under Clause (ii). That is to say, the spontaneously coagulated juice of capsules of poppy themselves and not any mixture with or without neutral materials of the Article falling under either of the first two clauses. In the instant case, the Excise Inspector who seized the article, also inspected it on the spot by adoption of several tests, namely, smell, touch, texture etc. and came to the opinion that it was opium. He repeated his opinion in evidence also. Indeed, he stated that the opium that he had seized was the spontaneously coagulated juice of poppy capsules. The Chemical Examiner does not say that it is not opium. Indeed, he confirms that it is opium. That should have been enough for the conviction of the respondent and it is immaterial whether it contained more or less than 0.2 of morphine because it was not the prosecution case that it was an article which fell within Sub-clause (3). Even the respondent did not raise the plea that the opium was one which fell under Clause (3). That being so, the order of acquittal recorded by the learned Sessions Judge must be set aside. The learned Magistrate has awarded the sentence of three months rigorous imprisonment and we think that that should be restored, in view of the fact that the quantity seized was not a trifle one.

3. The result is that we allow this appeal and convict the respondent and sentence him to undergo rigorous imprisonment for a period of three months. He shall be taken into custody forthwith to serve out the sentence.