

Narvirchand and ors. Vs. the State

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Court : Madhya Pradesh

Decided On : Nov-05-1951

Reported in : 1952CriLJ246

Judge : Dixit, J.

Appellant : Narvirchand and ors.

Respondent : The State

Advocate for Pet/Ap. : Mr. Dey

Judgement :

ORDER

Dixit, J.

1. The six petitioners in this case have been convicted by the Additional District Magistrate Shivpuri under Section 9(b) of the Indian Opium Act and sentenced to six months rigorous imprisonment each for the offence. An appeal preferred by the accused persons against their convictions and sentences was rejected by the Sessions Judge of Guna. They have now come up in revision to this Court.

2. The prosecution case, briefly stated is that on the night of 27.4.1951, Mr. Ram Singh, the Collector and District Magistrate, Raj Garh noticed in Pachhar Hotel a motor car bearing Registration No. P.N.E. 3002 carrying a flag generally known by

Rulers of Indian States. The car had a break down and the petitioners Balaram, Minaram, Hira Singh and Jit Singh were repairing the car. Mr. Ramsingh, thinking that the car belonged to some Ruler of former Indian States made some inquiries about the persons travelling in the car. He was told by the applicant Narootam that Narvir Chand was the Raja of Jubbal and that he himself was his A.D.C. Mr. Ram Singh was however, not satisfied about the identity of Narvir Chand, but at the same time he offered his services to Narvir Chandra, asked him to accompany him to Biora and told him that he would make the necessary arrangements for the repairs of the car. Narvir Chand declined the offer. The conduct of Narvirchand and of the other petitioners, however, aroused suspicion in the mind of Mr. Ram Singh about Narvir Chand and his companions being 'smugglers in opium'. On 28.4.1951, Mr. Ram Singh sent a wireless message to the Superintendent of Police, Shivpuri to intercept the car of the petitioners and to search it. Accordingly, the police made arrangements for stopping the car of the petitioners and on receiving information that the car had a break down near Dahalda, the police proceeded to Dahalda. They found the car of the petitioners being pulled by a motortruck. It was alleged by the prosecution that when the police expressed a desire to search the car, the petitioners Hira Singh and Jit Singh aimed their guns at the police party. The guns were, however, snatched by Sub Inspectors Lal Bahadur and Udaypal Singh. Thereupon, Narvir Chand aimed his pistol at the party. Head Constable Randhir Singh managed to snatch the pistol. The car and the petitioners were, then, taken to Shivpuri, where it was searched. The search revealed a box underneath the luggage carrier and in it was found 2 maunds, 29 seers and 3 chhataks of opium. The police, then, took up the investigation and found that the petitioners were in possession of this opium and were transporting it in contravention of rules made under the Opium Act. On 21.5.51. the Superintendent Customs and Excise of District Shivpuri presented, in the Court of the Additional District Magistrate Shivpuri, a charge-sheet against the petitioners in respect of offences under Section 9(a) and (b) of the Opium Act.

3. The learned Additional District Magistrate charged all the petitioners for being in possession of the opium and transporting it in contravention of Sub-rule (a) and (b) of Rule 4 of the Opium Rules and thus committing an offence punishable under Section 9 of the Opium Act. Balaram admitted that he was in possession of the

opium and was transporting it in contravention of the Opium Rules. The other petitioners denied having any knowledge of the opium in the car. They stated in their defence that while they were going in their own car from Jhalwad to Delhi, they had a break down. Soon after Balaram arrived at the spot from Kota in a car bearing Registration No. P.N.E. 3002 Balaram was known to them and he gave them a lift. This defence was rejected by the trial Judge. He found all the petitioners guilty of the offence under Section 9(b) of the Opium Act, observing that the transportation of opium by the petitioners implied that they were in possession of the opium.

4. When the revision petition was admitted by me on 19.8.51, I formed the view that if the conviction of the petitioners was correct, then the sentence of six months rigorous imprisonment imposed on each of the petitioners was, in the circumstances of the case, a light one. I, therefore, issued a notice to the petitioners to show cause why their sentences should not be enhanced.

5. It is clearly proved by the evidence on the record that on the night of 27.4.1951, the petitioners along with the car bearing Registration No. P.N.E. 3002 were in Pachhar, that Mr. Ram Singh met the petitioners in Pachhar and when he became suspicious about the movements of the petitioners, he sent a wireless message to the Superintendent of Police, Shivpuri to stop the car and search it and that when the car was searched on 28.4.51 in Shivpuri, 2 maunds, 29 seers and 3 chhataks of opium was found in the car. Mr. Dey, learned Counsel for the petitioners does not dispute these facts. He however, contends (1) that the applicants Narvir Chandra, Narootam, Jit Singh, Hira Lal and Mina Ram who were merely passengers in the car, cannot be said to have committed the offence of transporting opium as in the present case the act of transport could only be the act of the person driving the car, namely, Balaram; (2) that the Superintendent Customs and Excise had no power to put in a charge-sheet against the petitioners; (3) that the confessions of Mina Ram and Balaram having been recorded by the Second Class Magistrate, Shiv-puri who was not empowered under Section 164, Criminal P.C. to record any confession, were inadmissible in evidence; (4) and finally that under Section 9 of the Opium Act, the Magistrate could have sentenced the petitioners only to simple imprisonment and not to rigorous imprisonment.

6. Having heard the learned Counsel for the petitioners and the learned Government Advocate, I have come to the conclusion that the convictions of the petitioners Narvir phand, Narottam. Jit Singh. Hira Singh and Minaram for the offence of transporting opium cannot be upheld. Section 9 of the Opium Act is as follows:

Any person who, in contravention of this Act, or of rules made and notified under Section 5 or Section 8.

(a) possesses opium, or

(b) transports opium, or

(c) imports or exports opium, or

(d) sells opium, or

(e) omits to warehouse opium, or removes or does any act in respect of warehoused opium, and any person who otherwise contravenes any such rule, shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees or with both.

It is clear from the wording of the section and in particular from the words 'shall be punished for each such offence' that the possession, transport, import or export and selling off opium are all separate offences. For the offence of possession, it is necessary to prove both knowledge and control of opium. The offence of transporting opium consists in moving opium from one place to another within the State in contravention of the Opium Rules. The possession of a person transporting opium may be temporary for the purpose of transport only. It is not necessarily the possession which constitutes an offence under Section 9(a) of the Opium Act. A person possessing opium may carry it himself or entrust it to somebody else for carriage. If a person possesses opium and carries it himself, he is guilty of both the offences of possession and of transport though by virtue of Sections 40 and 71 of the Indian Penal Code, he cannot be awarded separate sentences for the offences. A strict construction of the definition of transport in the

Opium Act as applied to Part B. States would show that the offender is the person who removes opium from one place to another within the State. If the person possessing opium does not carry it himself but entrusts it to some other person for carriage in a car and that person carries the opium knowingly, then the driver of the car would be the person who transports the opium and person who directs him to do so would be the abettor of the offence of transporting. The occupants of such a car besides the driver can be said to have transported the opium only if it is shown that the opium in the car was in their possession so as to make them liable for the offence of possession. For, then alone can it be said that by using a motor vehicle for their own transport with opium in their possession, they themselves transported it.

7. In the present case the prosecution evidence is that some where near Shamgarh two persons handed over bags containing opium to Narvir Chand, who then directed Balaram to keep the bags in the car; that all the petitioners had knowledge of the bags containing opium and that the car was being driven by Balaram. In his examination under Section 342, Balaram stated that he himself had purchased the opium and kept in the car without the knowledge of the other accused persons and that he drove the car. On his own statement Balaram is clearly guilty of the offence of transporting opium. In order to hold the other petitioners guilty of the offence of transporting opium, the prosecution evidence must establish that the removal of opium from one place to another within the State was their own act by showing either that they caused the motor vehicle containing the opium to move or that if they did not by their act cause the vehicle to move, they were in such possession of the opium as amounted to an offence and thus by using the motor vehicle for their own transport with the opium, they transported the opium on their own. All the applicants were charged by the learned Magistrate with the offence of possession also. But he has not held that the petitioners committed the offence under Section 9(a) of the Opium Act of possessing opium. At one or two places in his judgment, the learned Magistrate has, no doubt, observed that the petitioners were in possession of the opium. On a careful reading of the judgment of the learned Magistrate, it appears to me that the possession of opium by the petitioners which the Magistrate has found proved is the possession of a carrier. Nowhere in the judgment of the Magistrate is there any

attempt to determine and find whether the possession of the petitioners was such as to hold them guilty of the offence under Section 9 (a) of the opium Act. To say, as the learned Magistrate did, that 'transportation includes possession', is one thing. It is, however, quite, different to hold that the petitioners committed the offence of possessing opium and were guilty under Section 9(a) of the Opium Act. If the learned Magistrate, by observing that the petitioners were in possession of the opium, meant to say that they were guilty of the offence under Section 9(a), he should have proceeded to convict them under both Section 9(a) and 9(b) of the Opium Act and should have passed an appropriate sentence covering both the offences. What the trial Court did was to convict them under Section 9(b) only and sentence them for that offence by observing that 'the transportation included possession'. In my opinion, the effect of this finding of the trial Court is that the petitioners who were charged with the offence of possession also were acquitted of the charge under Section 9(a). There is no appeal before me on behalf of the State against the decision of the trial Court praying that the petitioners be convicted of the offence under Section 9 (a) also. I am, therefore, bound by the finding of the Magistrate that the petitioners did not commit the offence under Section 9 (a). From this finding it must, further, be held that the petitioners' possession of the opium was not such as to constitute an offence under Section 9(a). It follows, therefore, that as the opium that was found in the car is not proved to have been in possession of the petitioners other than Balaram it cannot be said with regard to them that by travelling in the car containing the opium, they themselves transported the opium. There is no evidence to show that the motor vehicle containing the opium was caused to move by any act or acts of these five petitioners. In these circumstances, it is difficult to hold that the petitioners Narvir Chand, Mina Ram, Jit Singh, Hira Singh and Narottam transported the opium and committed an offence under Section 9 (b) of the Opium Act. I have also considered the question whether these petitioners can be said to be guilty of abetting the offence of transporting opium. The Indian Opium Act, 1878 does not contain any provision prescribing punishment for abetment of the offences under Section 9 of the Act. An abetment of the offence under Section 9 of, the Opium Act is, however, an offence under Section 109 of the Penal Code read with Section 40 thereof and is chargeable and punishable thereunder. By the second paragraph to

Section 40, Indian Penal Code, the word 'offence' in Section 109, I.P. C. denotes a thing punishable under the Penal Code and under any special or local law. There is no doubt that the Opium Act is Special Law and it seems clear that Section 109, I.P.C. can be applied to a thing punishable under the Opium Act. In my view however, the petitioners besides Balaram cannot be held guilty of the abetment of the offence of transporting opium because they were not charged with that offence. I am quite aware of the fact that there is a conflict of judicial opinion as to whether a person charged with a substantive offence can be convicted with the abetment of that offence when he was not charged with the latter offence. It seems to me that the decisions which hold that it is permissible to the Court to convict the accused of abetment when he was charged only with the substantive offence, proceed on the basis that abetment is a minor offence. I do not feel able to concur in this view. The ingredients that must be proved for the abetment of an offence are quite different from those required, to establish the substantive offence. A charge for the substantive offence, as such gives no intimation of a trial to be held for abetment. When a man is accused of a substantive offence he may not be conscious that he will have to meet an imputation of collateral circumstances constituting the substantive offence itself. See *Mahabir Prasad v. Emperor* 49 All 120; *Padmanaba Panji Kannaya v. Emperor* 33 Mad 264. Again, it is significant that Sub-section 2 (a) of Section 238, Criminal P.C. while it expressly makes mention of an attempt to commit an offence is silent as to abetment of an offence. The omission only shows that abetment of an offence is not a minor offence within the meaning of Section 238, Criminal P.C. Even if the view, that under Sections 236 and 237 of the Criminal P.C. this Court can alter a conviction for a substantive offence into one for abetment, is accepted as correct. I do not think the principle can be applied to the present case. For, firstly, the circumstances constituting an abetment of the offence under Section 9(b) have not been established with any clearness with respect to each of the petitioners other than Balaram and secondly, the trying Magistrate has not examined these accused persons on such collateral circumstances as can be said to appear in the evidence on the record. I do not think that Section 10 of the Opium Act can in any way help the prosecution for convicting the petitioners other than Bala Ram for abetment. Under this section an accused person cannot be called upon to account unless there is some prima

facie evidence of the accused having committed an offence under the Opium Act. There is no such evidence of abetment on the part of the five petitioners of the offence under Section 9(b).

8. In the view I have taken of the matter, it is unnecessary to consider the objection of the learned Counsel for the petitioners that the confessions of Balaram and Mina Ram are inadmissible in evidence. Even if these statements are excluded from evidence, Balaram is clearly guilty of the offence of transporting opium on his own statement which he made in the Court during the course of his examination under Section 342, Criminal P. C.

9. I am unable to accept the contention of the learned Counsel for the petitioners that the trial was vitiated as the Superintendent Customs and Excise had no power to put in the charge-sheet against the petitioners. The argument is that the Opium Act contains a special procedure for the arrest, searches, seizure, and for the initiation of the proceedings of offences under the Act and that under Section 20 of the Act the police alone had the power to initiate proceedings on a proper charge-sheet for the trial of persons believed to be guilty of any offence under the Act. It seems to me clear from the provisions of Sections 14 to 20 of the Opium Act, that the offences under the Opium Act are to be investigated inquired into and tried in accordance with the provisions of the Criminal P. C. The Opium Act does not lay down any scheme of procedure for the investigation and trial of offences under the Act. There is also no section in the Opium Act prohibiting a Magistrate from taking cognizance of any offence under the Act except on a charge-sheet presented by the police in accordance with the provisions of Criminal P.C. In the present case the entire investigation was carried out by the police themselves. On the basis of that investigation a charge-sheet signed by the Superintendent Customs and Excise was presented in the Court of Additional District Magistrate. In these circumstances I do not think it can be said that this irregularity in the presentation of the charge-sheet, which in my opinion, is curable under Section 537 of the Code, was one which vitiated the whole trial. Under Section 190(c) Criminal P.C. the Magistrate was competent to take cognizance of the offence upon a charge-sheet presented by the Superintendent Customs and Excise. Learned Counsel for the petitioners drew my attention to the decision reported in 'In re, Kuppusami AIR

(10) 1923 Mad 339. The Madras case dealt with a prosecution under the Madras Abkari Act which laid down an elaborate procedure for the investigation and trial for offences under that Act. The procedure has been examined in detail in that decision and it is clear that under the Madras Abkari Act, an accused person is placed in some respects in an advantageous position by the special procedure laid down in that Act regulating the course of investigation. It appears from that decision that the investigation in that case was carried on by the police instead of by the Abkari officers and a charge-sheet was submitted by the police. The learned Judges of the Madras High Court found that the investigation by the police and the submission of a charge-sheet by them instead of by the Abkari officers placed a considerable disability on the-accused and deprived him of the right of special procedure regulating the course of investigation. The learned Judges of the Madras High Court, however, observed that if the question were merely of a charge of offence under a special Act made after an investigation carried on in the ordinary way and not differing in material particulars from the investigation after which offences under the Penal Code are charged, they would have held that a charge presented by the police instead of by the Abkari Officer as required by the Act to be one-sufficient for taking cognizance of the offence by the Magistrate on that irregular charge-sheet. As I have said before, the Opium Act does not prescribe any special procedure for the investigation of the offences under the Act. The investigation of an offence under the Opium Act by the police or by any officer of the Departments mentioned in Section 14 of the Opium Act, is required to be conducted in accordance with the provisions of the Criminal P.C. The Madras High Court decision is, therefore, not applicable to the present case.

10. As to the contention of the learned Counsel for the petitioners that for an offence under Section 9 of the Opium Act, rigorous imprisonment cannot be awarded to an accused person, it is sufficient to state that under the General Clauses Act, the word 'imprisonment' means imprisonment of either description as-defined in the Penal Code. It cannot, therefore, be maintained that the punishment of imprisonment prescribed for an offence under Section 9, is only of simple imprisonment.

11. For the above reasons, I set aside the conviction and sentences imposed on Narvir Chandra, Narottam, Jitsingh, Hirasingh, Mina Ram. The conviction of Bala Ram under Section 9(b) of the Opium Act is affirmed. The learned Magistrate has sentenced him to rigorous imprisonment for six months for the offence. Considering the circumstances of the case, I think a sentence of six months rigorous imprisonment awarded to Balaram is a light one for the offence of transporting opium in such a large quantity as was found in this case. I enhance his sentence to one year's rigorous imprisonment.

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