**Om Wati Vs. State**

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**SooperKanoon Citation** : sooperkanoon.com/681495

**Court** : Delhi

**Decided On :** Oct-06-1989

**Reported in** : 1990CriLJ304; 1990(2)Crimes151; 40(1990)DLT69; 1990(18)DRJ162

**Judge** : P.K. Bahri, J.

**Acts** : Opium Act - Sections 3, 9 and 16; Code of Criminal Procedure (CrPC) , 1973 - Sections 13, 14, 100, 100(1), 100(2), 100(3) and 165; Punjab Excise Act - Sections 61; Mysore Excise Act - Sections 34 and 54; Foreign Exchange Regulation Act

**Appeal No.** : Criminal Revn. No. 223 of 1980

**Appellant** : Om Wati

**Respondent** : State

**Judgement** :

1. Judgment of the Metropolitan Magistrate February 12, 1980, by which he convicted the appellant of an offence punishable under S. 9 of the Opium Act and the subsequent order dated March 4, 1980, sentencing the appellant to undergo rigorous imprisonment for one year and to pay a fine of Rs. 1,000/- and in default to payment office, to undergo rigorous imprisonment for further period of six months.

2. In a raid carried out at the room in occupation of the petitioner on September 25, 1976, at about 8.10 a.m. in house No. 4010 situated at Bagichi Ram Chander in presence of the petitioner, in that room a bag was found lying underneath a cot and on opening the bag 9 kgs. 650 gms. of opium was recovered. A sample of 100 gms. was taken and after sealing the sample as well as the remaining opium, the same were taken into possession vide memo Ex. PW 2/A. The sample was got sent to the Central Forensic Science Laboratory (for short 'CFSL') and report Ex. PW 7/D was received from the expert of CFSL opining that the sample was of opium and the percentage of morphine was 3.5. Both the lower courts have given concurrent finding of fact regarding the aforesaid recovery of opium. The learned counsel for the petitioner has not questioned in this criminal revision, rightly so, the factum of recovery of the opium from the said particular room in presence of the petitioner. However, he has vehemently argued that there is no evidence to show that the petitioner was in conscious possession of the said opium and thus, she could not be convicted for the said offence.

3. The undisputed facts show that that particular room was in occupation of the petitioner, who was living in the said room with her husband and two children. The version of the petitioner that some other relations were also living in that very room along with them has been rightly disbelieved by the two courts below. The site-plan Ex. PW 7/C shows that the room, from which the opium was recovered, was not a very big room. So, the short question which arises for decision in this criminal revision is whether Keeping in view the fact that a huge quantity of opium had been recovered from a bag which was quite visible lying under the only cot available in the room in presence of the petitioner, could enable the courts to draw an inference that the petitioner was in conscious possession of the said contraband The learned counsel for the petitioner has, however, contended that possibility of petitioner being ignorant about the contents of the said bag cannot be completely overlooked inasmuch as the said bag could have been put there by petitioner's husband and the petitioner might not have known the contents of the said bag.

4. The learned counsel for the petitioner has made reference to certain case law in support of his contention that in the present case the petitioner could not be

deemed to be in conscious possession of the aforesaid opium. He has made reference to Jawar Arjan v. State of Gujarat, : 1980 CriLJ828 . In the said case, the facts were that the appellant was a rickshaw driver who has carried another person in his rickshaw and on rickshaw being searched, some balloons kept in a bag containing illicit liquor were found. The passenger as well as the appellant were convicted. The Supreme Court held that there is nothing to show that the balloons was clearly visible as to lead to the inference there from that the big contained illicit liquor. It was found that that articles were kept in a bag which was closed and the said bag had been put into the dicky of the rickshaw. So, it was held that the appellant, who was rickshaw driver, could not with the knowledge of the possession of the articles merely because the passenger had put those articles in the dicky of that rickshaw. The said case is distinguishable on facts because here the petitioner admittedly in living in the one room tenement along with her husband and huge quantity of opium had been recovered from the bag lying underneath the cot and from such facts it Cannot be said that no inference can be drawn that the petitioner was in conscious possession the opium lying in that bag. He has also made reference to Pritam Singh v. The State, 1966 P&H; LR 200, where it has been observed that possession implies knowledge and there would be no possession when there is no knowledge on the part of occupant of the cabin or the room. It was held that the onus of proving that knowledge is upon the prosecution. In the cited case, the opium was found in the accused's cabin without proof of any additional or extraneous facts to establish any connection between him and the opium. It was held that the petitioner in this case could not have been convicted of being in conscious possession of the opium. It would depend on the facts of each case in order to see whether the prosecution is able to prove or not that a particular accused was found in conscious possession of a particular contraband In the cited case, a truck driven by, Pritam Singh was stopped and 19 bags containing poppy-husk were recovered from that truck. Sampuran Singh was sitting with the driver in the front seat, Sikandar Singh and Bant Singh were sitting on the bags in the body of the truck, while Nichhattar Singh was sitting in a corner of the truck. All the petitioners were convicted under S. 9 of the Opium Act and were sentenced to various imprisonment and fines. The appeals filed were dismissed. All the petitioners then filed the criminal revision. A

single Bench of the Punjab High Court, however, came to the conclusion that it was not proved that the petitioners were having knowledge about the presence of the contraband in the said bags and so, they could not be considered to be in conscious possession of the incriminating articles and he gave benefit of doubt to all the petitioners and acquitted all of them.

5. In the present case, the facts are totally different. Here, the question is whether the petitioner could have remained ignorant about the contents of the aforesaid bag when she admittedly was residing in that room with her husband and two children and the bag was quite visible to her lying underneath the cot. The learned counsel for the petitioner also made reference to State of Himachal Pradesh v. Buti Nath, . Here, the facts were that the illicit opium was recovered from a motor garage belonging to the accused. In absence of any other evidence, it was held by the Judicial Commissioner that it was incumbent upon the prosecution to establish that the accused was in conscious possession of opium in question and as no evidence had been led to show that the accused was in conscious possession of the said opium, the accused was held to be not guilty. It is possible that in a garage which may be in possession of a particular accused the contraband can be placed without the knowledge of the accused but in the present case the bag which was lying under the cot could not have been surreptitiously put there without the knowledge of the petitioner who had been residing in the said room.

6. The learned counsel for the petitioner, has then, made reference to two unreported judgments of this Court. The first one of them is Criminal Revn. No. 27 at 1975, Gurbachan Singh v. State, decided on November 7, 1975, by S. Rangarajan, J. In the cited case, the facts were that the petitioners were found traveling in a taxi. On searching the said vehicle, nine bags containing tubes full of illicit liquor were recovered. The four bags were lying on the front seat while the five bags were lying on the rear seat. One of the petitioners Gurbachan Singh ran away from the place of occurrence whereas Arjun Singh and driver were arrested at the spot. It was found that the tubes containing the illicit liquor were all inside the bags and were not visible. It was held by the High Court that the driver of the vehicle could not be held to be in conscious possession of the said illicit liquor. So, the driver of the vehicle was given benefit of doubt and was acquitted. On facts,

this case is distinguishable.

7. Lastly, the learned counsel for the petitioner has made reference to Criminal Revn. Nos. 609, 70 and 71 of 1972, Smt. Sarla Devi v. The State, decided on April 20, 1973 by M. R. A. Ansari, J. In the cited case, a husband and wife were convicted of offence punishable under S. 61 of the Punjab Excise Act and S. 9 of the Opium Act. It was proved in the said case that the wife was found in possession of an air-bag which contained certain quantity of opium and charas while she was coming out of the house. The search of the house also yielded certain contraband lying in a trunk and also on a loft. The High Court held that the wife could not be considered to be in conscious possession of the contraband recovered from the trunk and the loft and she was acquitted of this charge in respect of the said contraband recovered from the trunk and the loft for which the husband alone was convicted and sentenced. Again the facts do not show that the husband and wife were living in one room tenement as in the present case. So, it could be said in the cited case that the husband alone could be in conscious possession of the said contraband recovered from the trunk and the loft of the house.

8. However, I may refer to Ashiq Miyan v. State of Madhya Pradesh, : 1969 CriLJ239 . In the said case, a house was raided and 2 maunds, 14 seers and 14 chhatacks of opium was recovered from the courtyard of the house. The pleas taken were that the appellants, who were all brothers, were in fact, been living separately and they were not present at the time of the recovery and it was possible that some outsider might have thrown the opium in the courtyard of the house but all these pleas were negatived by the courts below. It was found that the courtyard was place where various domestic articles were kept and the same was found to be a place in frequent use of all the appellants and it was also found that the appellants were present at the time of the recovery and the Supreme Court endorsed the findings of the lower courts below and held that all the appellants were in conscious possession of the said opium. The finding was also endorsed that presence of such a large quantity of opium could not have been possible without each of the appellants taking the other into confidence. So, it depends on the facts of each case to see whether the prosecution is able to bring home the

most important ingredients of the offence that the accused was in conscious possession of the contraband. The learned Additional Sessions Judge in his well written judgment has kept in view the huge quantity of opium recovered from the said bag and particularly the fact that there was only one room tenement in possession of the petitioner and her husband and thus, held that the petitioner could not have remained unaware about the presence of such huge quantity of opium in the bag lying underneath the cot. Hence, I see no reason to differ with the said findings. I hold that the petitioner has been rightly held to be found in conscious possession of the aforesaid opium.

9. The learned counsel for the petitioner has, then, argued that the amended provisions of S. 16 of the Opium Act and S. 165 of the Criminal P.C. have not been complied with. He has placed reliance on K. L. Subbayya v. State of Karnataka : 1979 CriLJ651 . In the said case, the provisions of Sections 34 and 54 of the Mysore Excise Act came up for consideration. The learned Additional Sessions Judge had in his judgment distinguished the said case when he found that the provisions of the Mysore Excise Act were differently worded than the provisions of the Opium Act. He analysed the provisions of S. 165 of the Criminal P.C. and came to the conclusion that those provisions were applicable when after registration of the case some investigation is to be carried out and not when a raid is made and recovery of some incriminating goods is made. I may, however, point out that it has been well settled principle of law that even if there takes some lapse in not complying with the provisions regarding search, the recovery effected on the basis of such search does not stand vitiated. I had an occasion to consider various judgment of the Supreme Court on this point in Richhpal v. State (Delhi Admn.), : 1989 Cri LJ 419. S. 16 of the Opium Act only lays down that all searches under Sections 13 and 14 shall be made in accordance with the provisions of the Criminal P.C. S. 100 of the Criminal P.C. was, in fact, applicable and it is not the contention of the learned counsel for the petitioner that the present search has not been made in consonance with the provisions of S. 100 of the Criminal P.C. S. 165 of the Criminal P.C. reads as follows :

'(1) Wherever an officer in charge of a police station or a police officer making investigation has reasonable grounds for believing that anything necessary for the

purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police officer proceeding under subsection (1), shall, if practicable, conduct the search in person.

(3) If lie is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search warrants and the general provisions as to searches contained in Section 100 shall, so far as may be, apply to a search made under this Section.

(5) Copies of any record made under subsection (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.'

10. Assuming for the sake of arguments that the provisions of S. 165 of the Criminal P.C. are mandatory in nature, still it cannot the held that the recovery effected would become invalid on the sole ground that some provisions of S. 165 of the Criminal P.C. have not been complied with. This point came up for consideration before the Supreme Court in Dr. Partap Singh v. Director of Enforcement, Foreign Exchange Regulation Act, : 1986 CriLJ824 of the judgment the Supreme Court held as follows :

'Assuming that it is obligatory upon the officer proceeding to take search or directing a search to record in writing the grounds of his belief and also to specify in such writing; so far as possible, the thing for which the search is to be made, is mandatory and that non-recording of his reasons would result in the search being condemned as illegal, what consequence it would have on the seizure of the documents during such illegal search. The view taken by a learned single Judge of the Calcutta High Court in New Central Jute Mills Co. Ltd. v. T. N. Kaul, : AIR1976 Cal178 , that once the authorisation for carrying out the search is found to be illegal on account of the absence of recording of reasons in the formation of a reasonable belief, the officer who has seized documents during such search must return the documents seized as a result of the illegal search is against the weight of judicial opinion on the subject and does not commend to us. In fact this decision should not detain us at all because virtually for all practical purposes, it can be said to have been overruled by the decision of the Constitution Bench in Pooran Mal v. Director of Inspection, : [1974]93ITR505(SC) . This Court held that 'courts in India and even in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure'. If thereforee, the view of the learned single Judge of the Calcutta were to be accepted meaning thereby that if the search is shown to be illegal, anything seized during such illegal search will have to be returned to the person from whose premises the same was seized, it would tantamount to saying that evidence collected during illegal search must be excluded on that ground alone. This was in terms negatived by the Constitution Bench. It has been often held that the legality in the method, manner or initiation of a search does not necessarily mean that anything seized during the search has to be returned. After all in the course of a search, things or documents are required to be seized and such things and documents when seized may furnish evidence. Illegality of the search does not vitiate the evidence collected during such illegal search. The only requirement is that the court '..... or the authority before which such material or evidence seized during the search shown to be illegal, is placed has to be cautious and circumspect in dealing with such evidence or material. This is too well-established to necessitate its substantiation by a precedent. However, one can profitably refer to Radhakishan v. State of U.P., : (1963)IILLJ667SC wherein the court held that assuming that the search was

illegal the seizure of the articles is not vitiated. It may be that because of the illegality of the search the court may be inclined to examine carefully the evidence regarding seizure, but no other consequence ensues. (See State of Maharashtra v. Natwarlal Damodardas Soni, : 1980 CriLJ429 .'

11. So, this judgment of the Supreme Court which is based on a decision given by the Constitution Bench of the Supreme Court in the case of Pooran Mal (supra) would be applicable. I may mention here that in M/s. Feeders Lloyd Corporation (P) Ltd. v. B. A. Lakshminarayana Swami, : AIR1969 Delhi26 a Division Bench of this Court has held that the provisions of S. 165 of the Criminal P.C. are directory in nature. Be that as it may, in view of the ratio of law laid down by the Supreme Court in the cases of Pooran Mal (supra) and Dr. Partap Singh (supra), I hold that the recovery made in the present case does not stand vitiated on account of non-compliance of some of the provisions of S. 165 of the Criminal P.C.

12. The learned counsel for the petitioner has also contended that no official has been examined from the CFSL to show as to who the sample was handed over and so, it is not proved that the sample remained unhampered from the time it was taken into possession by the Investigating Officer and till it was examined by the expert. The report of the expert of CFSL shows that the sample was received with the seal impression, as per specimen enclosed, intact. The contents of the report Ex. PW 7/D are to be taken as correct. In case the petitioner wanted to challenge the contents of the said report, the petitioner could have requested the magistrate for summoning the official of the CFSL for purpose of cross-examination to show that in fact the seal on the sample was not intact when the sample was received by the CFSL authorities. In my opinion, there was no necessity for the prosecution to have examined the officials of the CFSL to prove the contents of the report Ex. PW 7/D which was admissible in evidence under the provisions of the Code of Criminal Procedure without proving the contents of the same. So, I do not find any merit in this contention.

13. The learned counsel for the petitioner has lastly argued that the contents of the sample could not be termed as opium on the sole ground that it contained 3.5 percentage of morphine. He has made reference to Inder Singh v. State of Punjab

1981 CLR 114. In the said case, the sample analysed showed the presence of morphine percentage 6.6 and presence of meconic acid. The Division Bench came to the conclusion that the sample can be treated as opium. However, the Division Bench also made some observations that mere presence of morphine in the sample would not bring it in the definition of 'opium' given in S. 3 of the Opium Act. It is riot possible to agree with these observations of the Punjab High Court on this point. I had occasion to deal with this point in Satish Kumar v. State (1989) 1 DL 169, and had held that the presence of morphine of more than 0.2% is sufficient to show the sample as opium. I have come across the judgment of Division Bench of Lahore High Court in the Emperor v. C. J. Robinson, AIR 1922 Lah 216 : 23 Cri LJ 580. In this case, it has been hold that morphine is the alkaloid prepared from the poppy-heads and it is beyond doubt that it is an intoxicating drug and it fulfills the requirement of definition of 'opium' contained. in S. 3 of the Opium Act. 1878.

14. No other point has been urged

15. I, hence, maintain the conviction and sentence of the petitioner and dismiss the criminal revision. The Metropolitan Magistrate concerned shall see that the petitioner is arrested and undergoes the sentence and the Magistrate shall send the report to this Court in this connection.

16. Petition dismissed.