

Jai Parkash Vs. State

Jai Parkash Vs. State

SooperKanoon Citation : sooperkanoon.com/691199

Court : Delhi

Decided On : Apr-20-1979

Reported in : 1979CriLJ1167

Judge : M.L. Jain, J.

Appellant : Jai Parkash

Respondent : State

Judgement :

ORDER

M.L. Jain, J.

1. The petitioner was convicted under Section 9 of the Opium Act, 1878, and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 1,000/- in default whereof to rigorous imprisonment for 6 months. On appeal, his sentence was reduced to rigorous imprisonment for 9 months and a fine of Rs. 500/-, in default whereof to rigorous imprisonment for 2 months. Hence, this revision.

2. The prosecution case is that the petitioner was apprehended at about 1.10 A. M. on the night intervening 24th and 25th May 1975, at the G. T. Road Bus Stand in H Block Seelampur, by a police party which included a D. S. P. Asad Farookhi. The accused was found carrying a bag which contained opium about 4 kgs in

weight. The police took a sample of 200 gms. and sent it for analysis to the Central Forensic Science Laboratory. The said Laboratory found in the sample 5.13% contents of Morphine. It was in these circumstances that the aforesaid conviction took place.

3. The learned Counsel for the petitioner challenged the conviction on grounds more than one. The first of his arguments is that the petitioner was falsely implicated as the opium was not recovered from him. That no recovery was effected from him is attempted to be proved in a twofold manner. Firstly, it was said that there were no independent witnesses of the recovery, and secondly, the opium was recovered from the search of a house not belonging to him. Tej Ram, D. W. I. deposed that to police broke open the locks of house No. 366 to which the accused and his brother Kishan objected. So what the police did was that they instituted a case under the Arms Act against his brother Kishan, vide F. I. R. No. 243/75 dated May 25, 1975, and instituted this case against Jai Parkash. The investigating officer, Virender Singh, P. W. 5, did say that he searched the house No. 363 of the accused, but he gave no Explanation why he searched the house. This silence on his part should be construed to mean that the opium was not recovered from personal search. Now, the investigating Officer has denied to have searched any other house but that of the accused. The learned Addl. Sessions Judge observed, and correctly too, that there was nothing to arouse suspicion in the act of the investigating officer in further searching the house of the accused after the opium had already been recovered. Simply because nothing was found in the house of the accused, it cannot be said that the opium was planted on the accused. The F. I. R. proved by the accused only shows that accused Kishan Kumar was also carrying a prohibited arm in a public place. As regards the requirement of independent persons witnessing the search, one having some experience of the matter can easily believe the Police Officer if he says that none came forward to be a witness at that hour. I will rule out the allegation of false recovery for one more reason. The recovery was effected in the presence of a D. S. P. whose evidence cannot be disregarded for want of any good reason. It was next pointed out that there was no evidence that the opium was 4 kgs. in weight. Kuber Dutt, P. W. 1, said that he brought the scales from one Bhanwar Singh, a shopkeeper, but he could not give the number of the shop while Bhanwar Singh

appeared as a defense witness and denied that he gave any scales to the police officer. Like the appellate court, I will not place much reliance upon the evidence of Bhanwar Singh and would like to believe the police Officer, who has said that upon weighing the opium was found to be 4 kgs.

4. The second ground of attack on the judgment is that the prosecution has failed to prove that from the time of its recovery to the time of its delivery in the Laboratory, the sample was not tampered with. According to the report of the Laboratory, the sample was received by them on June 23, 1975, but head constable Iqbal Singh, P. W. 7, both in his affidavit and deposition, and constable Khazan Singh, P. W. 6, had deposed that the sample was carried by Khazan Singh on July 8, 1975. This difficulty was realised by the prosecution when some arguments had been heard and the case was fixed for further arguments on April 18, 1977. At first the prosecution wanted to salvage the case by calling the Analyst who did appear but was given up. Upon the request of the prosecution then the court examined constable Mir Singh as court witness on May 17, 1977. He deposed that he took the sample on June 23, 1975, to the Laboratory. After arguments, the case was posted for further arguments on July 12, 1977. But again on a request made by the prosecution, the court called Gurdev Singh, as court witness on July 30, 1977. Gurdev Singh, C. W. 2, brought the daily diary of June 23 1976, which was in the hand of constable Gopi Chand whose writing he refused to identify. The case was again posted for arguments but the court recalled Khazan Singh on Sept. 3, 1977, and Iqbal Singh on No v. 15 1977, who now resoled from their earlier statements. Three arguments were raised out of this confusion :

(1) that the investigation was tainted because the police officer in the statements of Khazan Singh and Iqbal Singh wrongly recorded the date of the dispatch of the sample as July 8, 1973, even though it was not, as now stated, the correct date;

(2) that the court went out of its way more than once in order to make out a case not alleged by the prosecution by calling two new witnesses and recalling the earlier two witnesses in the manner aforesaid to fill in the lacuna of the link evidence; and

(3) that the fact is that the actual sample was sent on July 8, 1975, while the sample which was examined by the Laboratory in June 1975 was not of this case. I have given my anxious consideration to this aspect of the case and I am extremely unhappy over the manner in which the Police Officer appears to have recorded the statement of the witnesses and the manner in which the court proceeded to call and recall witnesses almost at the behest of the prosecution, But, since both the courts below after this exercise have come to the conclusion that as a matter of fact it was Mir Singh who had carried the sample to the C. F. S. I. on June 23, 1975, I do not see any force in the argument that the possibility of tampering of the sample from the time it was recovered to the time it was delivered to the Laboratory has not been ruled out.

There is no doubt that there should be good evidence to show that the sample that was delivered to the Laboratory was the same which was recovered from the accused. But, on account of the confusion that prevailed because Khazan Singh and Iqbal Singh made incorrect statements, it should not be that the evidence of Mir Singh should be disbelieved. I am holding so for one more and stronger reason. This is a case of opium in which I am of the opinion that it was unnecessary to have it examined by a Chemical examiner. I have had an occasion to deal with such type of cases earlier as well. In *State v. Sukhram* 1976 Cri LR (Raj) 237, it was urged on the basis of Taylor and Modi's books that it was necessary for a conclusive determination whether a particular article contained opium or not to find the contents of meconic acid in the suspected article because meconic acid is found in no other substance except opium, while morphine with similar smell and properties can be found in lactucarium as well. I rejected the argument and held that people by smell could identify opium.

In a similar case again in *Anaram v. State of Rajasthan* 1977 WLN 99 : 1977 Cri LR (Raj) 162, in which relying upon a Supreme Court decision reported in *Baidyanath Mishra v. State of Orissa* 1967 SCD 1165 : 34 Cut LT 1 observed that people by smell and sight could identify opium and there was no need for Chemical examination. The learned Counsel for the petitioner tried to distinguish these cases by submitting that in these cases the persons who had stated that the article was opium were either cultivators of the areas in which opium is grown or

were excise officers with experience and expertise in handling the substance. S. I. Virender Singh, P. W. 5, has stated that the article was opium, but there is no evidence that he was proficient in identifying opium, he is no cultivator and no expert. Even in the Ruqua that he sent to the police station for registration of a case, he did not say that he had smelt the article to be opium. But, the distinction does not appeal to me. One need neither be a cultivator nor a dealer nor even an excise officer to be able to identify opium. In the Rajasthan case, I had observed that it is only in the case of a mixture that an analysis is necessary in order to determine whether the mixture is opium or not. But, where the article is spontaneously coagulated juice of capsules of poppy and has not been submitted to any manipulation, no Chemical examination is called for. In spite of the distinguishing features that the learned Counsel laboured to point out, I do not see any reason to differ from my earlier opinion. Opium has a characteristic appearance and characteristic scent and unless it is diluted or manipulated, anyone can say that it is opium, which it could be said of all Articles like petrol, kerosene, turpentine, etc. I will, therefore, give no importance to the argument that the report of the Laboratory should be disbelieved because there has occurred a slovenliness in the manner of proving as to when and how the sample was delivered in the Laboratory. I will altogether ignore the Laboratory report and relying upon the evidence of the police officers hold that the article seized was without doubt opium. I agree that the prosecution cannot be allowed to fill in the lacuna to the disadvantage of the accused, but the court has to exercise its powers under Section 311, Cr.P.C. whenever it appears to it be essential to the just decision of the case. Though I do disapprove of the manner in which and the delay with which the two new constables were called and the other two recalled, yet at the same time, I do not find that it affected the merits of the case. The learned Public Prosecutor has rightly urged that the case of the accused is not that what was recovered was not opium, but he had taken up the plea that nothing was recovered from him.

5. Lastly, it was urged that the accused in the circumstances of the case should have been given the benefit of probation as required by Section 360 of the Cr. P.C. The benefit of probation can be denied only if there are special reasons which are required to be recorded by the court. I agree that it was the duty of the courts

below to consider why compliance of Section 360 could be dispensed with even if the accused did not make any such request. But, this Court is not precluded from considering the matter. I, therefore, called a report from the Probation Officer, Delhi Administration, Delhi. He has recommended that the petitioner may be considered for the benefit of probation and may be placed under his supervision. He states that the accused comes from a low income group and being the eldest member has the burden to support wife, two children besides brothers, sisters, and old parents. He is a student also. He took to the crime because of unemployment and finding smuggling of opium an easy means of earning money. Though no doubt smuggling of opium deserves to be sternly dealt with, but in view of *Dilbag Singh v. State of Punjab* : 1979 CriLJ636 and the circumstances stated by the Probation Officer and particularly the way the trial lingered on after March 24, 1977, up to Jan. 17, 1978, I am inclined to grant him probation.

6. Consequently, I partly accept this petition, and direct as follows:

(1) The conviction of the petitioner is upheld;

(2) His sentence is set aside and instead he shall be released provided:

(i) he enters into a bond in the amount of Rs. 5,000/- with one surety in the like amount to appear and receive sentence when called upon within a period of three years and in the meantime: (a) to keep the peace and be of good behavior, (b) to abstain from intoxicants, and (c) to commit no crime; and

(ii) he shall remain under the supervision of the Probation Officer. Delhi Administration, for the aforesaid period.

7. The order was explained to the petitioner, and copies of this order shall be forthwith furnished to the petitioner, his surety and the said Probation Officer. The petitioner is allowed a month's time to furnish the surety and to report to the Probation Officer on May 14, 1979. The surety shall be to the satisfaction of the concerned Additional Sessions Judge.