

Bhairulal and ors. Vs. the State

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Court : Rajasthan

Decided On : Oct-14-1955

Reported in : 1957CriLJ237

Judge : Sharma, J.

Appellant : Bhairulal and ors.

Respondent : The State

Judgement :

ORDER

Sharma, J.

1. This is an application for revision by the two accused Bhairulal and Samandarsingh who were convicted by the learned 1st Class Magistrate, Bhawanimandi under Section 9 of the Opium Act and sentenced to six months' rigorous Imprisonment each and their conviction and sentence have been upheld by the learned Addl. Sessions Judge, Jhalawar on appeal.

2. The case for the prosecution was that Fayyazuddin Head Constable Police Chowki Pach-Pahar with two constables went to the jungle on the border of Madhya Bharat in the night between the 9th and 10th October, 1953 to check and hold up some stolen oxen which were to pass by that way. At about mid-night both the accused were seen passing that way, Samandarsingh accused had a cycle

with him and Bhairulal had a bag.

Both the accused were stopped by the police and on search it was found that the bag which was with Bhairulal contained contraband opium. A seizure memo was prepared and it was attested by two witnesses Fatehsingh P. W. 4 and Kalu Singh P W. 5. Both the accused were challaned under Section 9 of the Opium Act in the court of the 1st class Magistrate Bhavanimandi, The accused denied the charge and stated that they had nothing to do with article in question.

They said that the bag was found lying on the ground by the police and an unfounded charge was brought against the accused. Learned Magistrate, however, believed the prosecution evidence and found that both the accused had committed an offence under Section 9 of the Opium Act and sentenced them as mentioned above.

3. In this revision, it has been argued by Mr. D.K. Soral on behalf of the applicants that so far as Samandarsingh is considered, there is absolutely no evidence to show that he was found in possession of the article in question. It was argued that he has been convicted merely on the presumption that as he was related to Bhairu and was seen in his company, therefore, he too ought to be deemed to be in possession, of the article in question.

As regards Bhairu it was argued that there is absolutely no evidence on record to show that the article recovered by the police was opium within the meaning of Section 3 of the Opium Act. It was argued that the only witness, who was produced by the prosecution to prove that the recovered article was contraband opium, was Devisingh who had to state that he could not say whether the recovered article was pure or adulterated opium, and who had also to state that he did not chemically examine the recovered article.

It was argued that on this evidence, it cannot be held that the recovered article was opium within the meaning of Section 3 of the Opium Act. It was further argued that out of the four witnesses, who were produced to prove the recovery, the two independent witnesses, namely, Fatehsingh and Kalusingh have clearly stated that the so called opium was not recovered from the possession of any of the

accused in their presence.

They have simply stated that when they reached the spot at the call of the police, they found the bag containing the article in question on the ground. The only witnesses about the recovery are, therefore, the two police employees namely, Fayyazuddin and Ratansingh, who cannot be said to be independent witnesses. It was also argued that it is also doubtful on the evidence on record as to whether the seizure memo was duly prepared.

4. On behalf of the State Sri B. C. Chatterji, the Assistant Government Advocate conceded that so far as Samandarsingh is concerned, no offence was made out against him. However, as regards Bhairu, he argued that Devisingh, who was an Excise Inspector, had deposed that the article recovered was contraband opium and that this evidence was sufficient to prove that the article recovered was opium within the meaning of the Opium Act.

It was conceded that so far as Fatehsingh and Kalusingh are concerned, they cannot be taken to be witnesses for the recovery of the article in question, but it was argued that the evidence of Fayyazuddin and Ratansingh was quite sufficient to prove that the property in question was recovered from the possession of Bhairu and their evidence having been believed by both the lower Courts, there is no reason to go against that finding in revision.

5. I have considered the arguments of both the learned, counsel. It is true that the only evidence of the recovery of the property in question is that of Fayyazuddin and Ratansingh. Both of them were police employees. However for the simple reason that they were police employees, their evidence cannot be disregarded by a court of revision when it has been accepted by both the lower courts.

I will, therefore, not be justified in interfering with the finding of the lower courts that the article in question was recovered from the possession of Bhairulal. It is very difficult to procure any other evidence besides the evidence of the police or excise employees who made the recovery in a jungle at the mid-night. It is, therefore, not surprising that in this case no evidence other than that of the two police employees was available as regards the recovery of the article in question

from the possession of Bhairulal.

6. As regards the nature of the article, there is no doubt that the prosecution has failed to prove that it was opium within the meaning of Section 3 of the Opium Act. In cases like the present it is the duty of the prosecution to send the article in question to the chemical examiner for chemical examination because without it, it cannot be said as to how much percentage of the substance is there which would make its possession culpable.

Opium within the meaning of Section 3 is - (1) the capsules of the poppy; (2) the spontaneously coagulated juice of such capsules which has not been submitted to any manipulations other than those necessary for packing and transport; and (3) 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 percent of morphine, or a manufactured drug as defined in Section 2 of the Dangerous Drugs Act, 1936.

Mr. Devisingh was not able to say whether the article in question came under the first or the second or the third category given above. Simply saying that the substance was opium would not do. I am, therefore, constrained to hold that in this case prosecution has failed to prove that article in question was opium as defined in Section 3 of the Opium Act,

Both Bhairulal and Samandarsingh are therefore, entitled to acquittal on this ground alone. However, so far as Samandarsingh is concerned, there is one additional ground that prosecution has altogether failed to prove that the article in question was recovered from his possession and Mr. Chatterji had to rightly concede that the conviction of Samandarsingh cannot be justified.

7. The application for revision is allowed, the conviction and sentence are set aside and both the applicants are acquitted. They are on bail and need not surrender. Their bail bonds shall be cancelled.