

Gopal Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Sep-02-1988

Reported in : 1988WLN(UC)141

Judge : Gopal Krishan Sharma, J.

Appeal No. : S.B. Cr. Appeal No. 333 of 1988

Appellant : Gopal

Respondent : State of Rajasthan

Disposition : Appeal allowed

Judgement :

Gopal Krishan Sharma, J.

1. This appeal is directed against the judgment dated 5-8-1988 whereby, the Sessions Judge, Ajmer convicted the appellant under Section 8/18 of Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced him to 10 years' R.I. and a fine of Rs. 1,00,000/-, in default of payment of fine, to further undergo two years' R.I.

2. On 12-4-1986, the appellant was taken into custody by Head Constable Amanullah at Railway Platform, Ajmer. In the morning at 7.45 a.m. the Head Constable was checking the passengers who were getting down from the train.

Appellant Gopal seeing the Head Constable wanted to avoid him and he turned back. Gopal was interrogated by the Head Constable and during the interrogation the Head Constable felt something in the pocket of Gopal and from the pocket of his Bakhtari (shirt) one plastic glucose bottle was taken out. It was having opium. He was asked about the licence but he refused to have it. Gopal was brought to the Police Station where in presence of the witnesses his search was taken. Opium weighing 800 gms. was found in possession of Gopal. Two samples each of 30 gms. were taken from that opium and sealed in two packets. One sample was sent to the Forensic Science Laboratory (F.S.L.) for examination and the report of it was that the sample marked as 'A' was found to be of opium having 6.02% Morphine. Thus, after concluding the investigation challan was submitted.

3. The accused was charge-sheeted under Sections 8 and 18 of the Narcotic Drugs Act who pleaded not guilty and claimed trial. The learned Sessions Judge after concluding trial found the accused guilty of the charge and sentenced him to minimum sentence provided in the Act, i.e., 10 years' R.I. and a fine of Rs. 1,00,000/-, in default of payment of fine, to further undergo two years' R.I.

4. The learned Counsel for the appellant argued that the opium was seized vide memo Ex. P 2 and two samples of 30 gms. each were taken out from the opium recovered from the possession of accused Gopal. Regarding the seal which was affixed on these two samples it was argued that from the evidence of the witnesses it becomes doubtful that the seal remained intact in the Malkhana and was sent to the F.S.L. for examination in intact condition. In this regard it was brought to my notice that Ex. P 2 has the specimen of the seal. On looking to the specimen of seal only one word 'Ajmer' is readable. Except this word 'Ajmer' nothing is readable on the seal. This word 'Ajmer' is in English language. Report Ex. P 6 is the report of Chemical examination and in this report it has been mentioned that the seals on the packets were intact, but this report does not have the specimen of that seal. When these packets were sent to F.S.L. they must have been sent along with a forwarding letter and it is expected that this forwarding letter must have the specimen of the seal which was affixed on the sample packets while sealing them. That forwarding letter has not been produced. Therefore, it is not on the record to prove as to which seal was affixed on these

sample packets when they were sent to F.S.L. for examination. In this regard the statement of Bhawani Singh PW 2 was brought to my notice. Bhawani Singh was the Incharge of the Malkhana with whom the packets of remaining opium were kept. He has stated that the sealed packets in intact condition were sent to the F.S.L. for examination. All the packets had seal on them and in the cross-examination he has stated that the seal was in the name of Station Superintendent, Ajmer. The exact reply is **lhy ij LVs'ku v/kh[kd] vtesj dk uke fy[kk gqvk eSaus QnZ tCrh esa i<+ fy;k FkkA** According to this statement the seal was of the Station Superintendent, Ajmer and that too in Hindi. If the seal was in English language Bhawani Singh would have stated that the seal was in English language. Any way, it was for the prosecution to have cleared this doubt. It was the duty of the prosecution to prove that such and such seal was affixed on the sample packets and also on the recovery memo of articles and the packets were sent bearing with same seal in intact condition to the Laboratory. Ordinarily when the packets are sent to Laboratory a forwarding letter is sent and in that forwarding letter specimen of the seal is affixed so that the Director F.S.L. may compare the seal affixed on the packets with the specimen seal affixed on the forwarding letter. In the present case the specimen seal has not been produced. The forwarding letter along with the samples has not been produced. So mere mentioning in the report Ex. P 6 that seals are intact is of no value. Another aspect is that the seal belongs to Station Superintendent, Ajmer. After affixing seal on the memo of seizure and on the two packets the seal must have been returned to the Station Superintendent, Ajmer. In order to remove any doubt or suspicion it was the duty of the prosecution to have examined the Station Superintendent, Ajmer and his seal should have been produced in the Court. But this lacuna has not been fulfilled. The Station Superintendent has not been examined. He was a proper person to have stated that his seal was used by the S.H.O. while sealing the samples of the opium.

5. According to Ex. P 2 and witnesses two samples of 30 gms. each were taken from the recovered opium and they were kept in a cigarette packet and were sealed. Those cigarette packets were sent to the FSL for examination. According to report Ex. P 6, the packet marked as A contain 23 gms. substance. In this packet sample of 30 gms. opium was kept but when it was examined at the

Laboratory opium weighing 23 gms. was found. The argument of the learned Counsel for the appellant is that 7 gms. opium was found less which shows that the packet marked as 'A' was tampered with after its sealing.

6. The learned Public Prosecutor argued that 7 gms. opium might have evaporated between the period of sealing the opium for sample and keeping in the packets and opening the packet for examination. The opium was seized on 12-4-1986 and the packet was opened for examination after some period. The difference of 7 gms. in weight does not affect the merit of this report.

7. The S.H.O. Ram Chandra PW 5 in the cross-examination has stated that the seal which he used for sealing the packets was in English language. He did not use any seal in Hindi language. Thus, this statement is in contradiction to the statement of Bhawani Singh PW 2 and Behari Lal PW3 who have stated that on the seal the words were written in Hindi **LVs'ku v/kh{kd] vtesj A** Thus, in face of the arguments advanced as mentioned above by both the learned Counsel, the position of the seal affixed on the packets and on the memo Ex. P 2 becomes doubtful whether the seal which was used at the time of seizure of opium was the same seal which was on the packets marked as 'A' and 'B' when they were received at the Forensic Science Laboratory. It becomes doubtful whether the seal remained intact from the time it was affixed, it was kept in Malkhana and upto the period when it was sent to the Laboratory for examination.

8. Mool Dan PW 4 is the only witness in whose presence the accused was caught and the opium was seized. In the examination-in-chief he has stated that Constable Amanullah caught a person and he was called at Police Station, GRP along with Ramesh. After seeing the accused who was present in the Court he stated that he does not know whether the accused present in Court is the same person who was caught at the Railway platform by Amanullah Head Constable. So Mool Dan who is the independent witness examined by the prosecution has not stated that the accused present in Court was the same person who was caught by the Head Constable. Another person who was with him was Ramesh and has not been examined by the prosecution. So this fact also creates doubt in the prosecution story.

9. According to Ex.P 2 the opium was seized and the sample was taken in presence of the witnesses i.e. Ramesh and Mooldan. The accused was arrested vide memo Ex.P 3 in presence of the same witnesses Mooldan and Ramesh. Ramesh has not been examined. But Mooldan has stated that the person who was caught had a bag and that bag was opened at the Police Station. Some black substance was taken out from the bag but he cannot say whether it was opium or not. Sample was taken and memos were prepared and he was asked to sign those memos. In the cross-examination he has stated that after sealing the sample he went away and after half an hour/ 45 minutes he came back and put his signature on these memos. Thus, the argument was that Mool Dan was not present when the memos were prepared. He was called later on and was asked to sign these memos. In this regard the statement of this witness was perused and it cannot be said that the opium was taken at the Police Station and was sealed. Whatever difference in this statement is not so material one but it is certain that when the sample was taken and sealed, the documents which were prepared with regard to this seizure should have been written and signed in presence of these recovery witnesses. This witness has not stated that which seal was used by the SHO while sealing the packet. He has also not stated that where the seal remained. Who brought the seal and from where this seal was brought, Mool Dan has not stated a single word in this regard.

10. The learned Public Prosecutor has relied on the case of Radha Kishan Parashar v. State (1988(2) Crimes 298). In this case it has been observed that 'Section 20 provides that who ever, in contravention of any provision of the Act or any Rule or order made or condition of licence granted thereunder, inter alia, produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable in cases where such contravention relates to cannabis other than Ganja, with rigorous imprisonment for a term which shall not be less than 10 years. On reading the provisions of Sections 20 and 54 together, it necessarily follows that it is for the person who is found in possession of any such illicit drugs to prove that he holds a licence therefore or that he is in lawful possession of the same substance. If the presumption is not rebutted by such person, then the presumption will stand and there is reason what-so-ever for the prosecution to prove the unlawful and illegal

possession by such person of the said substance'.

11. While citing this case of Radha Kishan (supra) it was also argued that the S.H.O. in the Karvahi Police on the back of the First Information Report Ex. P 1 has mentioned that mere by smelling the substance was found to be the opium. The case of Ana Ram v. State of Rajasthan 1977 RLW 82 was also relied by the learned Public Prosecutor. In this case the case of Birda Nath Misra v. State of Orissa 1967 SCD 1165 was referred. In this case of Birda Nath (supra) the Hon'ble Supreme Court has observed as under:

It is true that opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. It is possible for people to identify opium without having to subject the produce to a chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be necessary.

12. The principle laid down by Hon'ble the Supreme Court cannot be disputed but the question is whether a person is capable to identify opium simply by seeing and smelling. If this can be done then certainly it is not necessary to send the substance for examination to Chemical Analyst. The Head Constable Amanullah PW1 and the SHO Ram Chandra PW5 are the two Police Officers; one who has caught the accused and the second who has investigated the matter and put up the challan. Both these witnesses are interested witnesses. Whether these two Police Officers can be relied on this aspect that the substance was opium? In this regard in the Karvahi Police it has been mentioned that by smell the substance was found to be the opium. As mentioned in the report Ex. P1 that this substance was found in a plastic bottle means it was a liquid. It cannot be said that it was a complete opium. It might be in a diluted form. It was, therefore, necessary to send it to Chemical Analyst for finding out its characteristic. Actually, the motbirs who were independent persons and in whose presence the substance was seized and if had they stated that this substance is opium because they smelt it or by seeing they are of this opinion that this substance is opium, then certainly the position would have been different. Motbir Mooldan (PW4) has not stated that the

recovered substance was opium. Other motbir Ramesh was not examined.

13. One thing is to be kept in mind that an Excise Inspector who deals with such substance off and on and who is an expert in this line can certainly say after seeing and smelling that the substance is opium because they had been trained in this aspect. For a Head Constable and SHO I do not think it is possible for them to say simply by seeing and smelling that the substance is opium one. Anyway, once the sample was sent to Chemical Examiner it was the duty of the prosecution to prove beyond doubt that the sample was sealed and seal was intact and it was sent in intact condition to the Laboratory for examination. In the present case as observed above that the matter of sealing and the seal was intact or not creates doubt and certainly when doubt is created the benefit of doubt is to be given to the accused.

14. It is really a matter of sorrow that in the cases under Narcotic Act when the punishment is made so severe and minimum sentence awarded is 10 years and a fine of Rs. 1,00,000/-, investigation was not to the mark. It is expected that the investigation should be in a far-far better condition.

15. In view of my above observations, I find that the prosecution has failed to establish its case beyond reasonable doubt. The benefit of doubt is, therefore, given to the accused.

16. As a result, the appeal is accepted. The accused is not found guilty under Section 8/18 of Narcotic Drugs and Psychotropic Substances Act, 1985 and his conviction and sentence as awarded by the learned Sessions Judge, Ajmer are set aside. The accused is in central jail Ajmer. He be set at liberty forth-with, if not required in any other case.