

Deva Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Sep-19-1991

Reported in : 1991WLN(UC)229

Judge : Y.R. Meena, J.

Appeal No. : S.B. Criminal Revision Petition No. 44 of 1984

Appellant : Deva

Respondent : The State of Rajasthan

Advocate for Pet/Ap. : Mr. N.K. Rastogi

Disposition : Petition allowed

Judgement :

Y.R. Meena, J.

1. This revision petition is directed against the judgment of the learned Sessions Judge, Pratabgarh dated 1.2.84, whereby, he upheld the conviction of the accused-petitioner for the offence under Section 4/9 of the Opium Act but reduced the sentence its 6 months from 1 year S.I.

2. Facts stated in short are that one Ambu s/o Balu informed the police that he purchased the opium from Deve s/o Gangaram Gujar r/o Dhamancha. On this

information, the house of Deve was searched in the presence of motbirs namely Dayaram and Shamburam. On search, the police found one Brass Katordan containing 1 kg. 500 grams opium. The samples were taken from that opium, and sent it to the Forensic Science Laboratory. On examination, it was found that the samples contained the opium. After due investigation, challan was put up in the court of the Additional Munsif and Judicial Magistrate, Begun. The prosecution has examined as many as 6 prosecution witnesses and statement of the accused was recorded under Section 313, Cr.P.C. Considering the material on record, the learned Addl. Munsif and Judicial Magistrate found the accused guilty for the offence under Section 4/9 of the Opium Act. Accordingly, he convicted the accused under that section and sentenced him to one year's S.I. and to pay a fine of Rs. 500/-, in default of payment of fine to further undergo two months' S.I.

3. Being dis-satisfied with the judgment of the learned Addl. Munsif & Judicial Magistrate, Begun dated 8.2.79, the accused preferred an appeal before the learned Sessions Judge, Pratabgarh, who by his judgment dated 1.2.84 upheld the conviction and reduced the sentenced as aforesaid.

4. The petitioner being aggrieved of the judgments of the courts-below preferred this revision before this Court.

5. I have heard Mr. N.K. Rastogi, learned Counsel for the petitioner and Mr. D.R. Bohra, learned Public Prosecutor for the State.

6. Mr. N.K. Rastogi, learned Counsel for the petitioner submitted that the conviction was not justified as the link evidence is missing. No exclusive possession of the accused-petitioner is proved. The motbirs of the recovery has turned hostile. He relied upon the decision of the Supreme Court in State v. Daulatram : 1980 CriLJ929 and on the issue of recovery, and also on the decision of this Court in Kasim Ali and Ors. v. State of Rajasthan 1991 (2) Crimes 806. On the other hand, Mr. Bohra, learned Public Prosecutor relied upon the judgments of the courts-below.

7. Whether the accused was in exclusive possession or not, is a disputed question of fact when concurrent finding against the accused has given by the courts-below.

In revision, I find no substance in the submission of the learned Counsel for the petitioner to give fresh finding in favour of the accused, hence, this plea of the learned Counsel for the petitioner is rejected.

8. The next submission of the learned Counsel for the petitioner, was that the link evidence is missing. The Malkhana-in-charge was not examined and in whose possession, the samples remained from 8.10.75 to 22.10.75. With regard to the recovery, no body was examined. The sample was taken 30 grams and in the Forensic Science Laboratory, it was found 40 grams. Whether the sample remained intact till it reaches to the F.S.L. or whether it was not tampered with. The possibility of tampering with the sample, cannot be ruled out.

9. In Daulatram's case (supra), their Lordships observed as under:

Where the samples on opium changed several hands before reaching the public analyst and yet none of those in whose custody the sample remained, were examined by the prosecution to prove that while in their custody the seals on the samples were not tampered with, the inevitable effect of the omission was that the prosecution failed to rule out the possibility of the samples being changed or tampered with during the period in question a fact which had to be proved affirmatively by the prosecution. Consequently, the accused could not be convicted under Section 9A. In such a case, the prosecution could not be allowed to fill up the gaps in the prosecution story at the appellate or revisional stage.

10. In the present case, two motbirs of the alleged recovery namely; Shambhulal and Dayaram. Shambhulal has turned hostile while Dayaram was not examined. In Kasim All's case (supra), the view has been taken that motbir witnesses have turned hostile therefore, the recovery cannot be held to be proved by the prosecution solely on the testimony of Investigating officer, the conviction is liable to be set aside.

11. Considering the view taken by their Lordships of the Supreme Court in Daulatram's case (supra) and the view taken by this Court in respect of the recovery, where the motbirs have turned hostile. In such circumstances, the conviction is not justified.

12. In the result, the revision is allowed. The conviction and sentence sustained by the learned Sessions Judge, Pratabgarh is set aside. The accused is on bail. He need not surrender to his bail-bonds.

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