

In Re: Wahib Basha

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Court : Chennai

Decided On : Feb-17-1960

Reported in : AIR1961Mad162; 1961CriLJ533

Judge : Ramaswami, J.

Acts : [Evidence Act, 1872](#) - Sections 106 and 114

Appeal No. : Criminal Revn. Case No. 740 of 1959 and Criminal Revn. Petn. No. 721 of 1959

Appellant : In Re: Wahib Basha

Advocate for Pet/Ap. : V.A.F. Coelho, Adv.;M. Narayanamurthi, Adv. for ;Public Prosecutor

Disposition : Revision dismissed

Judgement :

Ramaswami, J.

1. This is a revision which has been preferred against the conviction and sentence of the learned 7th Presidency Magistrate in C. C. 3126 of 1959.

2. On information received by the Assistant Commissioner of Police Crimes, Southern Range, Madras (P. W. 4) that the accused was dealing in ganja and

opium a surprise raid of his premises was organised. The Sub-Inspector of Police, P. W. 1 was directed to keep a watch over the house of the accused at No. 1/23 Ammer Unnissa Begum Street, Suparigunta. The Asst. Commissioner of Police himself was personally supervising the raiding operation.

In the course of the search of the premises occupied by the accused and his wife, P. W. 1, recovered from a room in the occupation of the accused and his wife a wooden box M. O. 13, wherein was found a packet of opium weighing 10 1/2 palams, M. O. 1, two packet? of opium weighing one gundumani, M. O. 2 series, a pawn ticket No. 3842 dated 4-10-1958 in the name of the accused, another pawn ticket, M. O. 3 standing in the name of the servant of the accused, M. O. 4 a brass weighing balance, M. O. 6 another balance, M. O. 6 a tea tola weight, M. O. 7 a five tola weight, M. O. 5 one rupee currency note, M. O. 9 a rupee coin, M. O. 10 other coins, M. O. 11 series, eight copper quarter anna coins coated with mercury, M. O. 12 series, a bichuva M. O. 14 and a patta knife, M. O. 15.

The accused was not present at the time of the raid but his wife was there at the time of the search and the seizure of the several articles mentioned above. P. W. 1 drew up the search list, Ex. P-I and P. W. 3 a baker and one of the tenants in the premises has attested this list. On account of the fact that information was received late there was no lime to obtain any search warrant from the Magistrate for conducting the raid and searching the premises of the accused.

The accused has no permit to possess opium. It is in the evidence of P. Ws. 1 to 4 that the articles M. Os. 1 to 15 were recovered from the room in the exclusive occupation of the accused and his wife. The seized opium was sent for chemical analysis and it has been certified by the analyst to be genuine opium. The opium recovered is worth more than Rs. 400/-. The accused surrendered at the police station on 16-2-1959. A chargesheet was thereafter laid.

3. The case for the accused was one of total denial of the possession of the contraband. He agrees that the pawn ticket, M. O. 3 stood in the name of the accused but he disputed the ownership of the wooden box M. O. 13. The accused did not examine any defence witness.

3a. The only point arising for consideration is whether the articles seized were from the exclusive possession of the accused. In this connection the learned Advocate Mr. Coelho raises an interesting point namely the presumption to be raised against the karta or housemaster in case of recoveries from the premises occupied by him and his family. Inasmuch as this point arises in our day to day administration of justice it requires a careful exposition at my hands so as to be of help to the Magistracy and the investigating agency.

4. Where an incriminating article is recovered from a house jointly occupied by several persons, three views have been taken by various courts on the question of its possession. (1) If several persons jointly occupy a house all of them are liable for conviction for incriminating articles recovered from that house; (2) if several persons jointly occupy a house and it cannot be shown in whose exclusive possession the incriminating articles were, none of those persons is liable; and (3) if several persons occupy a house then the head of the house is responsible for incriminating articles recovered from it unless it is shown that one of the other occupants had exclusive possession of them. View No. 1 no longer holds the field.

The correct position of the law lies somewhere between views No. 2 and 3 each case depending on its facts. The decisions in *Emperor v. Santha Singh*, AIR 1944 Lah 339; ILR 1945 Lah 137 and *Satyanarayana v. State* (a decision of this court in : AIR1953 Mad534 , summarises the law on incriminatory possession.

5. The question as to what exactly is contemplated by the word 'possession' is a somewhat complicated one and is not free from difficulty. However, the following requirements seem to satisfy the legal concept of the word 'possession'. Possession must be actual and not constructive; it must be to the knowledge of the possessor who must have dominion and control over the property and it must be exclusive except under rare circumstances.

6. There is no presumption that a father or head of family is in possession of everything contained in this house; neither can it be presumed that he is in control of anything so found. Grave miscarriage of justice might follow from the application of such a rule. A virtuous father might have the misfortune of having a son living with him, who is an unmitigated rascal and if this presumption is to be made, this

virtuous father must be presumed to be in possession of everything brought by the rascal son into the house.

Further, he must be presumed to have every such article under his control. Possession and control mean something more than mere constructive or legal possession and control. It cannot be said for the purposes of the criminal law that a man in fact possesses or has under his control something, the existence of which he has no knowledge. It may be said that he possesses it but only on the assumption that a man possesses everything in the house he possesses.

Possession and control required to constitute offences must mean conscious possession and actual control. There must be *metis rea* or guilty knowledge before a person can be convicted of such possession. If a father or housemaster is to be convicted merely because he is in possession of a house and therefore everything in it, then he can be held to be guilty where no *mens rea* exists and when he is entirely ignorant of the presence of an offending article.

Where a father or housemaster is ignorant of the existing of the offending article much less of its presence in his house it may be difficult or impossible for him to rebut the presumption of his guilt. No presumption can be made that the head of a family or housemaster must know of everything which may be concealed in his house and unless such a presumption can be made, he can-not be convicted on mere evidence of recovery with nothing more.

7. Where it is clear from the evidence of recovery that the housemaster or head of the family must have been aware of the incriminating articles, then different considerations arise. Other facts may tend to show that he was in possession or control of the article or that he and others were jointly in possession or control. On the Other hand, even where the head of the family or housemaster has knowledge of the existence of the article, the court cannot convict him only on the fact that he was aware of its presence in his house.

A father may know that one of his sons has an unlicensed pistol in a box in the son's room, but that does not make the possession of the pistol that of the father and the pistol being in the son's possession could not be said to be under the

control of the father. In cases where the evidence does not point to the possession or control of any particular member of a household, the head of the family or the housemaster is in much the same position as other members of the family. He cannot be convicted in such cases merely because he is the head of the house and no court is bound to convict him or should convict him in those circumstances.

8. One other matter requires a reference. It is not always necessary to trace exclusive possession. Sometimes an article may be in possession or under the control of more than one person. All the adult members of a family might be concerned, for instance, in the illicit distillation of liquors or spirits. In such a case all should be convicted. It is not suggested that the recovery of an article in a house occupied by several persons is proof of joint possession but that fact coupled with other evidence might establish such joint possession.

Every case must depend upon its particular facts and the court must consider each case and come to a conclusion whether it is proved that the incriminating article is in the possession or under the control of any particular person or in the possession or under the control of more than one person. If on the evidence the court cannot hold possession or control by any person or persons, then the case is not established. To the first question, therefore, whether in cases, where incriminating articles are recovered from a place in the occupation of more persons than one and it is not possible to fix the liability on any particular individual, a court is bound to hold that the said articles were in the possession or under the control of the head of the family, the answer is in the negative.

9. The second question if the court is not so bound, whether it would be legally permissible to call upon the occupants of the place to account for the presence of the incriminating articles in their premises and in the absence of any satisfactory explanation on their part, to hold all of them to be in possession or control of the same raises matters of considerable difficulty. Where an incriminating article is found in a house occupied by several persons, the onus is not thrown upon those persons to establish their innocence.

Section 106 of the Evidence Act can clearly have no application where an article is found concealed in a house occupied by a number of persons. Such article may

have been concealed by its owner not only from the outside world but from the persons who were in joint occupation of the house with him. In such a case the possession and control of such article could never be described as a fact which was especially within the knowledge of all the persons living in that house.

On the other hand, where an article, as a gun is lying in a room and visible to all the persons occupying that room, then it seems fairly clear that all such persons would in most cases, know whose gun it was and who had possession and control over it. It is in these circumstances that it is suggested that Section 105 of the Evidence Act cannot apply to such a case too. In all criminal charges the onus of proving the guilt of the accused rests on the prosecution and it never shifts on the accused by reason of Section 106. Vide AIR 1944 Lah 339.

9a. On the question of the presumption to be drawn against (a) the karta or housemaster (b) the junior member, and (c) defendants, a considerable volume of case law has grown up and which may be profitably studied; Queen Empress v. Sangam Lal ILR All 129; Western v. Peary Mohan, ILR Cal 898: (AIR 1914 Cal 396) ; Mahabir Singh v. State, : AIR1951 Pat296 ; Gopinath Naick v. State, : AIR1957 Ori287 ; Punia Mallah v. Emperor, : AIR1946 Pat169 Dhalu Mridha v. Emperor, ILR (1946) Gal 619; Dasu Ram. v. State, ; Kesar Singh v. State, ATR 1934 Punj 286. The entire case law on the subject has been collected and described in the monumental AIR Commentaries on the Indian Evidence Act (Corpus Juris of India) Vol. 5, Section 114 Note 9.

10. The word 'possession' implies a physical capacity to deal with the thing as we like to the exclusion of every one and a determination to exercise that physical power on one's own behalf. These two elements physical and mental are described by Roman jurists as corpus and animus respectively. But as the authors of the Indian Penal Code point out in their note appended to their draft of the Indian Penal Code:

'We believe it to be impossible to mark with precision by any words the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists and in which the language of lawyers and of the multitude would be the same. It will hardly be doubted for example that a gentleman's watch

lying on the table in his room is in his possession though it is not in his hand and though he may not know whether it is on his writing table or on his dressing table; as little it will be doubted that a watch which a gentleman lost a year ago on a journey and which he has never heard of since is not in his possession, It will not be doubted that when a person gives a dinner his silver forks while in the hands of his guests are still in his possession, and it will be as little doubted that the silver forks are not in his possession when he has deposited them with a pawn-broker as a pledge. But between these extreme cases there will be many cases in which it will be difficult to pronounce with confidence whether the property is or that it is not in a person's possession.'

11. A person may have possession of a thing through his representative provided (i) the representative has physical control over the thing;(ii) the physical control is exercised on behalf of the principal; and (iii) the principal agrees to such exercise.

12. It is not necessary, however, as shown in the above illustration, that this physical power of dealing with the thing should be retained at every moment of time. It would be enough for the purpose of retaining possession if that physical power can be produced at any moment the possessor wishes it. Possession is lost with the loss of physical control. Similarly it is not necessary that the intention to possess should be constantly in the mind of the person exercising possession. It is enough if the determination to keep is not lost as soon as that mental element ceases to exist the possession is lost.

13. To sum up, the Indian Penal Code does not define the word 'possession' though Section 27 says that when property is in the possession of a person's wife, clerk or servant on account of that person it is in that person's possession and this is not always clear. Case-law on the subject has, therefore, to be resorted to. The principle to be deduced therefrom regarding possession is that, a man has not the possession of that, the existence of which he is unaware of.

Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object. The

difficulty under this head arises when prohibited articles are recovered from places under joint family possession.

It is now, however, well settled that in the case of a family living jointly in the same house the head of the family is presumed to be in possession of any illicit article found in the house. *AJR 1914 Cal 396*; *Emperor v. Budh Lal*, *ILR 29 All 598 : 6 Cri LJ 23*; *Mangar Koiri v. Emperor*, : *AIR1936 Pat512* ; : *AIR1951 Pat296* ; *State v. Girdharilal Chunilal*, *AIR 1955 NUC 961*. The presumption is rebuttable and the weight attached to it must vary according to circumstances. It can be easily rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of one member of the joint family.

In the case of a family living jointly the presumption against the head of the family also varies according to the improbabilities that the article owing to its size etc., should have escaped the notice of the head of the family or it was unlikely that such Incriminating article would have been found by chance or that any of the sons could have taken possession of the article and hidden it in the house without informing the father or that such article could have escaped notice or could remain concealed in the house without his knowledge.

Similarly, where two or more persons are charged with joint illegal possession, it is incumbent on the State to prove (a) that each of the accused had either physical or constructive possession of the property or (b) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter. *Vide : AIR1953 Mad534* .

14. These principles will be found set out in the following well known and useful publications: Sir John Salmond's *Jurisprudence*, Ch. 13 and 14 (pp. 236-267); V. B. Raju, *I. C. S. Notes 15 S. 114 of Evidence Act*; Raju's *Penal Code*, p. 141; Y. H. Rao. *Circumstantial and Presumptive Evidence*, p. 178 and foll. Woodroffe and Ameer Ali. *Law of Evidence Tenth Edn.. Vol. III pp. J336B and foll.*

15. Bearing these principles in mind if we examine the facts of this case we find that the prosecution, has brought home exclusive possession of the articles seized to the accused and it is idle to contend that this illiterate unworldly domestically

confined pardanishin woman, namely, the wife of the accused would have transacted in opium and should be deemed to be the person to have been in possession of opium seized. In the context of the ease the police very properly did not chargesheet her and as a matter of fact they had released her after formally arresting her.

16. The conviction is correct and the sentence is appropriate. Both are confirmed and this revision is dismissed.

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