

In Re: Pachiripalli Satyanarayana

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Court : Chennai

Decided On : Sep-09-1952

Reported in : AIR1953Mad534; (1953)IMLJ175

Judge : Ramaswami, J.

Acts : Madras Prohibition Act, 1937 - Sections 4; [Evidence Act, 1872](#) - Sections 114

Appeal No. : Criminal Revn. Case No. 189 and Cri. Revn. Petn. No. 175 of 1952

Appellant : In Re: Pachiripalli Satyanarayana

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : L.S. Veeraraghava Ayyar, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

Ramaswami, J.

1. This is a criminal revision case which has been filed against the conviction and sentence of the learned District Magistrate, Visakhapatnam in C. A. No. 30 of 1951, confirming the conviction and modifying the sentence in C. C. No. 1046 of

1950, Sub Magistrate, Visakhapatnam.

2. The facts are: The petitioner-accused before us was the Head Establishment Clerk, p. T. O's Office, Bengal-Nagpur Railway. He is an elderly man who is suffering from heart trouble and is also said, to be otherwise sickly. This accused has got a grown up son who has been examined as D. W. 4 in this case and that son's wife is one Jayalakshmi, who has not been examined. The accused and his son and daughter-in-law all lived in the same house and the evidence is that they are undivided and the accused is the tenant of that house. It is in these circumstances that the following incident took place.

3. P. W. 1 Sri G. N. Brahma, who is the Inspector of the Special Police Establishment of the Government of India with headquarters at Puri on information received in regard to certain other matters, with which we are not concerned here and which might well be guessed, obtained a search warrant from the District Magistrate, Visakhapatnam, on 4-12-1949, and searched the house of the accused.

4. In the course of the search on 5-12-1949 in the presence of the then Stationary Sub Magistrate, who has been examined as P. W. 5, Mr. S.N. Singh, Section Controller of B. N. Railway, Waltair, who was residing close to the house of the accused and who has been examined as P. W. 3, the local Sub-Inspector Mr. C. V. Naidu and the Railway Sectional Officer, Mr. S.J. Naidu attached to the Special Police Establishment with headquarters at Puri and who has been examined as P. W. 2, 21/2 bottles of Haywoods Fine Brandy, VAT No. 4, were found in the house of the accused. The half bottle M. O. 1 was found in the bottom drawer of the mirror almirah in the southernmost room of the house of the accused. The full bottles with the original company seals were found in the iron safe in the same room. They were seized along with other articles concerned in the other case for which the search was made in the first instance and a search list Ex. P. 1 was prepared. These bottles of brandy were handed over along with a report the same day by the Special Establishment Police Inspector P. W. 1 to the local Prohibition Sub-Inspector Mohamad Lal Sherif, examined as P. W. 4. This prohibition Sub-Inspector came to the spot took up the investigation and prepared another

Panchayatnama and which has also been signed by the aforesaid persons. It is not disputed that before the search the person of the searching officers was searched by the Magistrate as well as by the outside witness Mr. S.N. Singh. The accused was present at the time of the search. On 5-12-1949 the Prohibition Sub-Inspector enquired the accused in regard to the recovery of these bottles of brandy and possession of the same by him, The accused in Ex. P. 4 stated that he was suffering from fever and that he was unable to give any statement. The accused was again called upon to appear and give a statement on 7-12-1949 and in regard to which also he sent a report Ex. P. 5 that he was still sick and was unable to give a statement.

5. On the accused being charge-sheeted for an offence under Section 4(i)(a), Madras Prohibition Act that he was found to have been in possession of two full bottles of brandy in his iron safe and a half bottle in a mirror almirah in his house without being covered by permit, he came forward with the version that these bottles were found in the southern room of the house and that his only son, who is D. W. 4, and his wife Jayalakshmi are living separately in that house in that separate room and that the keys for these receptacles were in the possession of Jayalakshmi and that the accused had nothing to do with that southern room or the receptacles and that he should not be construed to have been in possession of these brandy bottles within the meaning of the Madras Prohibition Act rendering him liable to be convicted under Section 4(i)(a).

6. Therefore the short point for determination in all the Courts is whether the prosecution has brought home possession of these brandy bottles to this accused.

7. The word 'possession' as can be summarized from Chaps, 13 and 14 (Pages 236-267) of Sir John Salmond's Jurisprudence, Chap. 11 (Pages 162-174) of Holland's Jurisprudence and Markby's 'Elements of Law', Chap. 9 (Pages 177-203) 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.

8. 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 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.'

9. 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.

10. 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.

11. The case-law on the subject to which we have got to resort to -- because 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 -- is not always clear. But if

these cases are rightly studied 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: -- 'Shwe Kyo V. Emperor', AIR 1929 Rang 121 (A); -- 'Dula Singh v. Emperor', AIR 1928 Lah 272 (B); --'Ram Charan v. Emperor', AIR 1933 All 437 (C); -- 'Kuldipchand v. Emperor', AIR 1934 Lah 718 (D); -- 'Lakhan Singh v. Emperor', (E); -- 'Cyril C. Baker v. Emperor', : AIR1930 Cal668 ; -- 'Jayaramulu Naidu v. Emperor', AIR 1923 Mad 50 (G); --'Emperor v. Abdul Rahman : AIR1940 All449 ; -- 'Surju Prasad v. Emperor', (I) and -- 'Sundar Singh v. Emperor', AIR 1936 Lah 758 (J).

12. 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: 'Emperor v. Mir Ahmad', AIR 1937 Pesh 73 (K); --'Weston v. P.M. Das', AIR 1914 Cal 396 (SB) (L); -- 'Emperor v. Mast Ram', (M); -- 'Harbans Singh v. Emperor', AIR 1941 Nag 296 (N). 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. 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 tho latter: -- 'Narumal Davaldas v. Emperor', AIR 1937 Sind 44 (O); -- 'Mataro v. Emperor', AIR 1929 Sind 9 (P) and -- 'Dodo Racho v. Emperor', AIR 1937 Sind 154 (Q).

13. This is the line of decisions arising under four important heads viz., (a) Section 114, Indian Evidence Act -- Illustration (a); (b) Arms Act; (c) Abkari Act and (d) Opium Act. It will be remembered that under Section 114, illustration (a), in order

to draw the presumption, the possession must be exclusive. But where stolen goods were found in a house, inhabited by a joint Hindu family composed of a father, his son, and grandson and the circumstances were such that it was very improbable that such property could possibly have been placed where it was found without the connivance of some or all the members of the family, held that under the above circumstances the conviction of the managing member under Section 411, Penal Code was a proper conviction: -- 'Emperor v. Budhlal', 29 All 598 (R) -- 'Queen Empress v. Sangam Lal', 15 All 129 (S) referred to.

14. In -- 'Algoo Misir v. Rex', 4 Dom L R (All) 264 (T) Saran J. held that

'to render a person liable to conviction under Section 19(f), Arms Act, arms should be recovered from his possession or control. Merely because arms are found in a house belonging to a family, it cannot be said that the head of the family who is in possession of the house must also be in possession of the arms in the rooms in the house and is therefore liable. It has to be proved by evidence that the room in which the arms or the offending articles are found or are recovered were indeed in possession of that person or was under his control. It has to be proved that some particular person or individual was in possession or control of the room or that portion of the house from which the arms were recovered in order to justify a conviction under Section 19(i).'

Possession of the key of a box containing arms in the house of the accused, must be held to be possession of arms for purposes of Section 19(f), Arms Act, as the possession of the key of the box by the accused tends to show that the accused must have knowledge of the presence of the arms in the box: Vide -- Mahtabali Shah v. Emperor', AIR 1947 Sind 192 (U).

15. Then coming to Bombay Abkari Act, construing Section 43 (1) (a) (h) it was held in --'Apparama Mali v. Emperor', : AIR1934 Bom16 (V) as follows: The accused lived jointly with his two brothers in a clump of huts. Of the three huts that were there the middle one was occupied by accused with his family, the two adjoining huts by his two brothers and their families. At the back of the huts there were some fields jointly cultivated by the brothers. In each of three huts were found articles which suggested that the inhabitants were or had been in

possession of illicit liquor and in the fields were found some bottles containing liquor and tins of jaggery-wash intended for the preparation of illicit liquor. Held, that the only reasonable inference which could be drawn from the possession of the articles would be that the accused or the accused and his brothers were manufacturing illicit liquor and that the possession of these articles which could not be explained on any other hypothesis was for the purpose required by Clause (h) of Section 43, Bombay Abkari Act. Held also the fact that the evidence of possession would tell with almost equal force against the brothers of the accused was no ground for holding that possession has not been proved against the accused himself. If the evidence as to possession is adequate in the case of the accused it does not assist him at all to say that on the same evidence other persons might have been tried and convicted along with him. But when illicit liquor was found in the room occupied for the night by the son and his wife for sleeping, it does not necessarily mean that the son was in the exclusive possession of the room. The legal possession still remains with the father, the house-master, and there is obvious possibility that the liquor was stored there by the father. We must look to attendant circumstances to establish some element of knowledge on the part of the son and if evidence forthcoming is found insufficient, son is not guilty of possession: -- 'Emperor v. Binjha', AIR 1930 Lah 884 (W); -- Bimal Protiva Debi v. Emperor : AIR1942 Cal464 .

16. Similarly, under the Opium Act, it has been held by Thadani, C.J. and Ram Labhaya, J. in -- 'Bholanath Sarma v. King', AIR 1949 Assam. 73 (Y) that where substantial amount of opium is found in the bedroom of the accused with weighing scales and small weights, knowledge of the presence of the opium in the house can reasonably be attributed to him under Section 10, Opium Act. The accused is then required to account satisfactorily for his possession' and his failure renders him liable to a conviction under Section 9 of the Act. In -- 'Wazir v. Emperor', AIR 1935 Pesh 68 (Z) it was held that the possession of the husband does not necessarily connote that the wife also was liable under Section 9. Where opium is recovered on a search of the house in which the accused lived with his wife, the husband alone is responsible for the opium discovered and it cannot be presumed that the wife was also jointly in possession with him.

17. To sum up, in the case of a family living jointly in the same house the head of the family will be presumed to be in possession of any illicit article found in the house; but this presumption is rebuttable and the weight to be attached to it must vary according to the circumstances as laid down in -- 'Emperor v. Mir Ahmed', AIR 1937 Pesh 73 (K) and --'Weston v. Das', AIR 1914 Cal 396 (L). The strength of the presumption 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: -- 'Harban Singh v. Emperor', AIR 1941 Nag 296 (N) 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: -- 'Jwala v. Emperor', : AIR1934 All548 (ZA) or the nature of the occupation -- 'Ismail v. Emperor : AIR1929 All705 or the nature of the participation of the other members in the manufacture, storing and disposal of .the illicit article: -- 'Fernando v. Emperor : AIR1931 Mad490 ; -- 'Nga Shwe Toe v. Emperor', AIR 1937 Rang 434 (ZD). Possession in order to justify a conviction under the Abkari Act need not necessarily be exclusive possession: -- ' : AIR1934 Bom16 (V)'; --'Harsh Nath v. Emperor', AIR 1915 Cal 719 (ZE) and -- 'Parmai v. Emperor : AIR1934 All129 . The only point that must be proved in all these cases is that the accused or all the accused persons were aware of the presence of the illicit article and had control of the same.

18. Bearing these principles in mind when we examine the evidence in this case we find that the possession of the brandy bottles has been brought home beyond reasonable doubt to this accused. This accused is the head of the undivided family. It was he who rented that house. He was occupying an important position in life and was suffering from heart trouble and a certain amount of weakness for which a particular, type of Doctors recommend! brandy in small quantities both for bracing of heart as well as to prevent depression and alleviate pain also. The keys for opening the almirah and iron safe were handed over by this accused. It is quite possible as spoken to by the servant of this accused that the keys were in the actual custody of the daughter-in-law as this elderly man may not like to carry about a bunch of keys with him and might have left to his daughter-in-law the household duties of keeping the keys, etc. This would not make Jayalakshmi the

culprit because the suggestion made that these brandy bottles might have been purchased by her for confinement was found to be wholly untrue and her last child was more than a year old at the time of this offence and there is no suggestion that she was carrying. On the other hand, Jayalakshmi's husband comes forward and says that neither his wife nor himself ever took brandy. Similarly, the fact that the articles of Jayalakshmi and her husband have been kept in the safe and the almirah is neither here nor there. It would not disprove the possession of this accused. One significant circumstance showing that the present suggestions are afterthoughts is the fact that this accused stoutly declined to give an explanation regarding the presence of the brandy bottles either on the 5th or on the 7th on the pretext that he was unwell though one would imagine that the fever from which he is stated to have been suffering could not have prevented him from saying in a few words as to how the brandy bottles came into the almirah and the iron safe. Therefore, putting all these circumstances together both the lower Courts rightly found that the accused was in possession of these illicit articles.

19. The conviction is correct and the sentence of imprisonment till the rising of the Court and a fine of Rs. 200/- imposed by the Sub-Magistrate are equally correct. I am unable to understand the setting aside of this imprisonment till the rising of the Court, which had already been undergone by the accused, by the District Magistrate (Judicial) of Visakhapatnam. In fact he need not have gone to the extent of setting aside the imprisonment which he could not set aside because this imprisonment till the rising of the Court would not disentitle the accused from getting any of the benefits of gratuity etc., if otherwise he is entitled to them.

20. There are no grounds to interfere and this Criminal Revision Case is dismissed.