Narayan Chandra Borah Vs. Emperor

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Court : Kolkata

Decided On : Mar-08-1928

Reported in : AIR1928Cal324

Appellant : Narayan Chandra Borah

Respondent : Emperor

Judgement :

Mukerji, J.

1. This rule has been issued to show cause why the conviction of and the sentence passed on the petitioner should not be set aside or such other or further orders should not be passed as to this Court may seem fit and proper on grounds Nos. 3, 4 and 5 of the petition.

2. The petitioner is a salesman in a licensed opium shop. On a surprise visit being paid to the shop by an Inspector of Excise two irregularities appear to have been noticed; 1st, that the petitioner had sold a short weight of opium to a customer, and 2nd, a quantity of opium 27 tolas 9 as in weight was found in excess of the quantity shown in the took register, and if; was found hidden in the premises. On these irregularities charges under Clauses (c) and (f), Section 9, Opium Act, were laid against the petitioner. The Sub-Divisional Magistrate convicted the petitioner under both the clauses. The owner of the shop was jointly tried with the petitioner and was acquitted; and with him we are no longer occurred. Against his conviction

aforesaid the. petitioner appealed to the Sessions Judge who set aside the conviction under Section 9, Clause (f), Opium Act, holding that the evidence relating to the short weight sale was not satisfactory. He, however, upheld the conviction under Section 9, Clause (c), and reduced the sentence originally passed on the petitioner.

3. Grounds Nos. 3, 4 and 5 of the petition upon which the rule has been issued are that the petitioner was not in possession of the opium, that if he possessed it, it was possessed under a license and that the charge is defective.

4. It has been found by the learned Sessions Judge that cakes of opium supplied by the treasury are often overweight; and of six cakes taken at random none was underweight, but all were overweight, the excess averaging about 11 tolas in 80 (=1 sr.). On this finding it would be essential to superadd a further finding that it was not possible for the petitioner or his master to have acquired the 27 tolas 9 as by accumulation of the excess supplied by the treasury, before it can be said that this quantity which was found in the shop was not covered by the license. There is no such finding in the judgment of the Sessions Judge; and indeed on the materials adduced on behalf of the prosecution it is not possible to arrive at such a finding. The Sessions Judge has based the conviction on the fact that the excess was not reported to the authorities, nor shown in the stock register, but was kept hidden. The clause runs:

Any person who in contravention of this Act or of rules made and notified under Section 5 or Section 8 possesses opium &c.;

5. None of the facts on which the learned Sessions Judge has relied can be found to contravene any of the provisions of the Act. The charge framed against the petitioner does not set out which rule or rules framed under Section 5 or Section 8, the petitioner has contravened by not reporting the excess to the authorities, or not showing it in the stock register or keeping it hidden. This should have been stated in the charge if it was intended to prosecute the petitioner for being in possession of the excess in breach of any such rules. It is obvious that before the petitioner can be convicted for being in possession in contravention of a rule, he should be told which rule he is alleged to have contravened. The question therefore arises

whether a retrial should be ordered so that the petitioner may be retried on a charge properly framed. Now, I have been taken through the conditions of the license and the rules framed under the Act, but I am not satisfied that there has been a breach thereof on the part of the petitioner in possessing the opium as he did. I do not find any rule enjoining a duty on the petitioner to reweigh the quantity of opium supplied by the treasury and enter in the stock register the actual weight, and not the weight which the treasury has declared. If he keeps his accounts on the footing of the weight as given by the treasury, it can hardly be said that Rules 30 and 31, are contravened. Failure to report the excess or keeping the opium hidden is perhaps even less thought of by the rules. It has also been urged that it is possible that the petitioner came by the excess by selling short weight to customers, but I do not see my way to make such an assumption against the petitioner, the more so as the positive case of short weight that was made against the petitioner has failed.

6. The result, in my opinion, is that the rule should be made absolute. The conviction of the petitioner is accordingly set aside. The fine if paid should be refunded.