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**Court :** Kolkata

**Decided On :** Jul-02-1930

**Reported in :** AIR1930Cal668,129Ind.Cas.184

**Appellant :** Cyril C. Baker

**Respondent :** Emperor

**Judgement :**

1. This is an appeal against the order of the learned Chief Presidency Magistrate convicting the appellant, Cyril C. Baker, of an offence under Section 9, Opium Act (1 of 1878) and sentencing him to six months' rigorous imprisonment and to pay a fine of Rupees 1,000 or in default of payment thereof to a further term of three months' rigorous imprisonment.

2. The facts are shortly as follows: the appellant is, or was, at the time of the alleged occurrence, Assistant Wireless Operator of the B.I.S.N. Co's 'S.S. Edavana,' which was due to leave on the night of 23rd January or morning of 24th January last for Rangoon and the Straits. On the evening of 23rd January at about 7 p.m. a party of Customs Preventive Officers went on board the ship and searched the appellant's cabin, which was an ordinary 2nd class cabin on the lower deck having in it two berths and a settee. The accused accompanied the officers from the top deck and opened the door of the cabin with a key which he produced either from his pocket or from the top of a ledge outside the door of the cabin. Upon that point there was some controversy at the trial. This much however

is clear that the door was locked and that it was opened by a key produced by the accused. On search being made twenty-seer packets of opium were found concealed in the covering of the settee and the mattresses of the upper and lower berth. The accused was thereupon taken into custody, and was in due course sent up for trial and convicted and sentenced as stated.

3. The defence set up was that the accused knew nothing whatever about the opium and that to use his own expression it was 'planted' there by someone else. It was suggested that a Goanese servant, or 'boy', who was employed to wait on the accused and the other wireless operator, was the real culprit, and in support of that suggestion reliance was placed on the fact that this 'boy' mysteriously disappeared from the ship on that same evening just about the time of the search, that he was found missing when the ship left next morning, and that he has not since been heard of. To prove this fact an entry in the ship's log (Ex. A) was put in by the defence from which it appeared that the 'boy' was entered as having deserted the ship, that a small sum was due to him as wages, and that this and his effects were subsequently made over to the Shipping Master at Rangoon.

4. As the learned Chief Presidency Magistrate has observed in his judgment the facts were almost all admitted. The opium was found in the accused's cabin after he had himself opened the door with the key which he produced. The question therefore was whether he was in possession of the opium within the meaning of the word as used in Section 9(c), Opium Act. That again depends upon what is meant by possession and whether it means mere physical or de facto possession, that is to say, in the sense of something that is found in a place which is in the exclusive occupation of some person or whether something more is required, and whether it connotes conscious possession with knowledge. It has been argued on behalf of the Crown that so soon as it is established that the opium was found in the de facto possession of the accused, that is to say in the cabin exclusively occupied by him, the effect will be that under Section 10 of the Act the presumption will be that the accused will be deemed to have committed the offence unless he can satisfactorily account for his possession. The presumption will however only come into play when it has been proved that the accused has dealt with the opium in any of the ways described in Section 10. So that we come

back again to the question whether he was in possession. In regard to that we take the view that possession implies knowledge, and that there would be no possession when there is no knowledge on the part of the ostensible occupant of the cabin or room as in the case may be and when it is shown that the opium was placed there by some one else. Such possession as this can hardly have been meant since in that case the element of criminal intention or knowledge would be entirely wanting.

5. Proceeding then upon the footing that the possession must be conscious possession the question is whether it has been proved beyond reasonable doubt that the accused was in possession of the opium. Now there can be no doubt that up to a certain point the facts go very much against the accused. The opium was admittedly found in a cabin occupied exclusively by him, the door of which was kept locked and was opened with a key which he himself produced.

6. The quantity of opium too is remarkable being no less than 20 seers in weight in packets of 20 one-seer each concealed as already stated under the cover of the settee and in the mattresses of the two bunks. At first sight these facts seem to be almost conclusive against the accused, and it is difficult to believe that anyone else could have placed them there or that at all events that the accused could have been ignorant of the presence of the opium. If he had that knowledge he would of course be guilty.

7. But the case is complicated by the evidence regarding the mysterious disappearance of the Goanese boy, and the importance of this piece of evidence is this, that it gives rise to a doubt whether the boy could have been the culprit and whether it is possible that the accused was, as he claimed, ignorant of the fact that the opium was in his cabin. To my mind the 'fact which militates mostly against this theory is the fact that such a large quantity of opium was found, since it does seem difficult to believe that the Goanese would have dared to place such a large quantity of opium in his master's cabin knowing as he must have done that his master might enter the cabin at any moment and discover its presence with the consequences which would naturally ensue therefrom.

8. Whether the accused had knowledge of the opium or not one fact is we think abundantly clear and that is that the 'boy' was concerned in the offence either alone and independently, or as a confederate of the accused. The evidence in that connexion is significant as it shows that he disappeared suddenly just about the time when the search was made. According to the testimony of the first wireless operator the 'boy' was serving him when he began his dinner at 7 p.m. and he then disappeared and could not be found. He was not seen again and next morning was entered in the log as having deserted the ship. Indeed he left in such a hurry that he abandoned, as stated above, his personal effects, and also a small amount of pay which was due to him. The learned Magistrate thought that his disappearance might be explained by his having had something to do with the information, but there is no evidence to support that conclusion, nor does it seem probable if that was the reason, that the boy would have delayed his departure until the customs officers were actually on board. Had that been the reason for his departure it seems probable that he would have left much earlier, and have taken his personal effects with him. The suddenness of his departure suggests rather that he cannot have been the informant.

9. The 'boy' had access to the cabin and the suspicious circumstances in which he left the ship go to show we think that he undoubtedly had knowledge of the fact that the opium was in the cabin.

10. But the question still remains whether the accused also had this knowledge. Prima facie, as I have said, it is difficult to believe that the 'boy' would dare to secrete so large a quantity in the cabin with the risk of its being discovered at any moment. But there are some facts in this connexion which have to be taken into consideration. The accused was according to the evidence on duty on the top deck and it was about the time apparently when he usually had his dinner. It seems probable whoever placed the opium where it was found that it was only intended to be a temporary resting place, and that it would afterwards be removed to some safer place. There is a port-hole just over the settee where some of the packets of opium were found. It is possible that the 'boy' who as we have held had undoubtedly taken a guilty part in the matter, was alone responsible for placing the opium where it was found, and that taking advantage of the temporary absence of

his master he hid the opium in the cabin intending afterwards to remove it to some other place. In this connexion it may be borne in mind that the cabin was on the lower deck and that the porthole would afford a convenient means of smuggling the opium on board. The sudden and unexpected arrival of the customs officers just before the ship was due to sail may have upset any such plan.

11. There are other circumstances which deserve consideration. We agree with the learned Magistrate that the fact that the accused took the officers to his cabin does not help him because he had no option in the matter, and it was a case of force majeure. At the same time there is nothing in the evidence to show that the accused showed any reluctance to accompany the officers or that his demeanour was that of a guilty man. On the other hand he at once disowned any knowledge of the opium and said that; it must have been 'planted.'

12. I may mention at this point that the theory has for the first time been propounded on behalf of the Crown that the entire story about the 'boy' is a myth, and that it was a subsequent afterthought designed with the object of exonerating the accused. We do not think that such a suggestion ought to have been made. It was never part of the case for the prosecution at the trial nor was any cross-examination directed towards showing that the boy had never in fact existed. All that was suggested was that it had not been given out on that night that the boy was missing. The evidence to prove that the boy did exist is overwhelming, and the learned Magistrate has accepted that view with which we agree.

13. On a careful consideration of the evidence and of all the facts and circumstances the conclusion at which we have arrived is that while there is undoubtedly ground for grave suspicion against the accused the element of reasonable doubt is not excluded, and that it would not be safe to conclude that the accused had the knowledge which is necessary to convict him of the offence. The onus of proving that knowledge was upon the prosecution and in relying solely upon the bare fact that the opium was found in the accused's cabin without proof of any additional or extraneous facts to establish any connexion between him and the opium they have failed to discharge that onus. It is apparent that careful investigation might have been expected to establish some of these missing links.

We are not prepared on the evidence as it stands to hold that it proves beyond reasonable doubt that the accused was aware of the presence of the opium in his cabin, and we think he is entitled to the benefit of that doubt. The result therefore is that we now the appeal, set aside the conviction and sentence, acquit the accused, and direct that the fine, if realized, be refunded. The appellant will be discharged from his bail bond.

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