

The State Vs. Kali

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Court : Himachal Pradesh

Decided On : Oct-16-1950

Reported in : AIR1951HP28

Judge : Chowdhry, C.J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Section 162; ;Code of Criminal Procedure (CrPC) (Amendment) Act, 1941; ;[Evidence Act, 1872](#) - Sections 25 and 27; ;[Opium Act, 1878](#) - Sections 9 and 10

Appeal No. : Criminal Appeal No. 5 of 1950

Appellant : The State

Respondent : Kali

Advocate for Def. : Bishen Singh, Adv.

Advocate for Pet/Ap. : Bakshi Sita Ram, Adv.

Disposition : Appeal allowed

Judgement :

Chowdhry, J.

1. This is a Government appeal against the acquittal of the respondent Kali of a charge under Section 9 (c), Opium Act, by a learned Magistrate of Nahan.

2. One maund and twenty-nine seers of opium was discovered from a hillock about four furlong a from the respondent's house on being pointed out by him. The prosecution case is that the discovery was preceded by a statement made by the respondent to the police that he along with others had concealed the opium there. The defence was that the opium had not been concealed by the respondent but by others, and that the respondent had detected those others concealing the opium and informed the police about it.

3. The respondent produced no evidence in support of his version, but the learned Magistrate found himself precluded from finding him guilty by two rulings of the Allahabad and Lahore High Courts reported as *Baldeo v. Emperor*, A. I. R. (27) 1940 ALL. 263 : (41 Or. L. J. 627 F. B.) and *Hakamkhudayar v. Emperor*, A. I. R. (27) 1940 Lah. 129 : (41 Or. L. J. 591 F. B.). There was a conflict of opinion amongst the various High Courts in regard to the admissibility of a statement made to the police which led to the discovery of the incriminating article, but, that conflict has been set at rest by the amendment of Sub-section (2) of Section 162, Criminal P. C., by the Code of Criminal Procedure (Second Amendment) Act (xv [15] of 1941). By this amendment nothing in Section 162 shall be deemed to affect the provisions of Section 27, Evidence Act. The effect of this amendment is that a statement falling under both the sections, i, e., 8, 162, Criminal P. C. and Section 27, Evidence Act, may be proved against the person making it subject to the limitations prescribed by the latter section, It appears that the Criminal Procedure Codes in possession of the Bench and the Bar at Nahan were old editions not containing the amendment, which is really unfortunate. The result is that the learned Magistrate was not precluded from considering the statement made by the respondent to the police.

4. The statement which the respondent is alleged to have made to the police before the discovery of the opium was the following :

'One and a half months ago Bootinath, Hira Singh and Deep Chand had brought four bags of opium to me, Then I and those persons buried it on a hillock four furlongs from my house. Later a Sikh companion of Bootinath took away one bag. Three barga are still lying there covered with water-proof,'

As to what statement the respondent had made before the discovery, reference has to be made to the statements of four prosecution witnesses, S. I. Bakshi Mulraj, C. I. Mian Hoshiar Singh and two search witnesses Jagdish Chand and Kighan Singh. It was argued by the learned counsel for the respondent that the statements made by these prosecution witnesses were full of discrepancies, that therefore the only evidence against the respondent was that he had led the police party to the place of discovery, and that this only proved that the respondent had knowledge where the opium lay concealed and did not amount to proof of possession.

5. There is no doubt that in the absence of proof of incriminating statement made by the respondent which led to the discovery of the opium, the mere fact of the opium having been discovered on being pointed out by the respondent would not be sufficient to prove possession of the opium by the respondent within Section 9 (c), Opium Act, But the contention of the learned counsel for the respondent in regard to the existence of discrepancies in the statements of the aforesaid prosecution witnesses is not well founded. (His Lordship considered their evidence and continued.) It is clear, therefore, that there is no conflict in the statements of the four prosecution witnesses although certain portions of the statement ascribed to the respondent were deposed to by some of the witnesses and not by others. For instance, Jagdish Ohaud only spoke of the respondent having told them about the concealment of the opium by Bootinath and his companions. He was, however, not asked further whether the respondent also had taken part in the concealment. That being so, it is not open to the defence to interpret the statement of this witness as implying that only Bootinath and his companions, and not the respondent also, had a hand in the concealment of the opium. I take it, therefore, that the aforesaid statement was in fact made by the respondent to the police before the discovery of the opium.

6. The next question is as to how much of that; statement is admissible under Section 27, Evidence Act, Under that section when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered

may be proved. In other words, any portion of the information conveyed by the accused which does not relate distinctly to the discovery will not fall within the section and will, therefore, be barred under Section 26, Evidence Act, or Section 169, Criminal P. C. Judged according to this principle, the only portion of the statement of the respondent which is admissible under Section 27, Evidence Act, is 'I buried the opium on a hillock four furlongs away from my house.'

7. It was argued by the learned Government Advocate that the rest of the statement made by the respondent was also admissible under Sections 8 and 9, Evidence Act as statement explanatory of the respondent's conduct. This contention cannot be accepted inasmuch as the prohibition contained in Section 162, Criminal P. C., would extend to all statements made to a police officer in the course of an investigation under Ochap. XIV, irrespective of whether those statements be admissible under any provision of the Evidence Act, except Section 27 of that Act. In other words, if a statement does not come within the exception of Section 37, Evidence Act, it cannot be admitted in evidence by circumventing the provisions of Section 162, Criminal P. C., on the ground that it is relevant under some other section of the Evidence Act. This is also the view which was expressed in *In re Vridhickand Sowcar*, A. I. R. (30) 1943 Mad. 527 : (44 Cr. L. J. 766). Furthermore, a close scrutiny of the portions of the statement of the respondent which have been excluded by me will show that they do not strictly fall within Sections 8 and 9, Evidence Act. It is, however, not necessary to pursue the point any further. The learned Government Advocate was at pains to show that the excepted portions were admissible in evidence in order to support his contention, that not only had the respondent taken part in concealing the opium but that after the concealment he had also been left in charge of it by Bootinath etc., in order to keep watch over it. That would no doubt be a circumstance strengthening the prosecution, but its absence does not affect the result of the case. The portion of the statement, of the respondent which I have held as being admissible in evidence is sufficient to establish the fact that he was one of the persons who concealed the opium at the spot from where it was recovered. Even though that spot was not owned or possessed by the respondent, the aforesaid statement along with the production of the opium from the spot referred to in the statement is sufficient to establish the respondent's possession and control over the opium.

Emperor v. Chokhey, A.I.R. (24) 1987 ALL. 497: (38 Cr. L. J. 910) and Chavadappa Pujari v. Emperor, A. I. R. (32) 1945 Bom. 292 : (47 Cr. L. J. 51).

8. The opium in question having been proved to have been found in possession of the respondent within Section 9 (c), Opium Act, it lay on him to have accounted for it satisfactorily under Section 10 of that Act. This the respondent did not do, as he adduced no evidence. It is clear therefore, that the respondent is guilty of the offence under Section 9 (c) of the Act. The appeal is accordingly allowed, the order of acquittal is set aside and the respondent Kali Ram is sentenced to six months rigorous imprisonment and a fine of Rs. 50 (rupees fifty). In default of payment of fine, he will suffer further rigorous imprisonment for three months.

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