

Dasondhi Vs. the State

Dasondhi Vs. the State

SooperKanoon Citation : sooperkanoon.com/889095

Court : Himachal Pradesh

Decided On : Oct-23-1952

Reported in : AIR1953HP36

Judge : Chowdhry, J.C.

Acts : [Opium Act, 1878](#) - Section 9; ;[Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 342, 439 and 537; ;[Evidence Act, 1872](#) - Section 3

Appeal No. : Criminal Revn. No. 13 of 1952

Appellant : Dasondhi

Respondent : The State

Advocate for Def. : Kanwar Dalip Singh, Adv.

Advocate for Pet/Ap. : Jai Gopal, Adv.

Disposition : Revision allowed

Judgement :

ORDER

Chowdhry, J.C.

1. This is an application in revision by one Dasondhi against his conviction by a first class Magistrate of Nahan for an offence punishable under Section 9 (b),

[Opium Act, 1878](#), and the sentence of two months' rigorous imprisonment and Rs. 200/- fine, or further two months' rigorous imprisonment in default of payment of fine, imposed upon him. His appeal has been dismissed by the learned Sessions Judge.

2. One Tika Ram was also tried along with the present petitioner, and he has been convicted and sentenced under Section 9 (a) of the said Act for having been found in possession of contraband opium. It has been found that he was given a lift by the petitioner in a jeep, of which the petitioner was a driver, on the evening of 22-9-1951 from a place in the outskirts of Nahan to a spot about two furlongs on the Nahan side of the octroi and police barrier at Kala Amb. It has also come in evidence that while travelling in the jeep driven by the petitioner Tika Ram had with him a bag. Tika Ram was apprehended early the following morning near Kala Amb with about nine seers of contraband opium in the said bag. As Tika Ram travelled as aforesaid in the jeep driven by the petitioner, the latter has been convicted under Section 9 (b) of the Act for transporting the said opium.

3. There can be no doubt that mere transport of contraband opium would be no offence. In order that the petitioner be held to have committed the offence in question there should be a finding that he knew that he was transporting contraband opium. One of the arguments put forward by the learned counsel for the petitioner in this connection was that no question was put to the petitioner under Section 342, Criminal P. C., as to such conscious transport of the opium in question. That is no doubt true, for the only question put to the petitioner in this connection was whether Tika Ram had the bag in question with him when he was being given a lift by the petitioner. No question was put to him as to the contents of the bag. It was the duty of the Magistrate to question the petitioner in the course of his examination under Section 342 with regard to conscious transport of the opium in question. At the same time, that is an irregularity in procedure which was curable under Section 537 of the Code since it has not been shown that the petitioner has in any way been prejudiced in his defence or the omission or irregularity has occasioned a failure of justice, it is noteworthy that the petitioner categorically denied that Tika Ram was at all travelling in his jeep, a denial which has been found to be totally unfounded. The said omission under Section 342 of

the Code is therefore immaterial.

4. It has however been strenuously argued by the learned counsel for the petitioner that there is no evidence worth the name that Tika Ram, whilst he was being given a lift by the petitioner in his jeep, was in possession of the opium with which he was apprehended the following morning, or, in any case, that even if it be conceded that Tika Ram was travelling in the petitioner's jeep in possession of the contraband opium in question, that the petitioner was cognisant of that fact. Both these points have been decided by the two Courts below against the petitioner on foot of certain circumstances.

Before I proceed further it must be remembered that the jeep was stopped at the octroi post at Kala Amb at about 8 p.m. on 22-9-1951, that Tika Ram had alighted from the jeep a short time before at a spot about two furlongs from the octroi post and that it was at about 5 O'clock the following morning that Tika Ram was apprehended by the police with the contraband opium in question somewhere near the spot where he had got down from the jeep. It will also be remembered that the contraband opium found in possession of Tika Ram consisted of nine cakes weighing about nine seers. The circumstances on which the two Courts below have relied for arriving at the said conclusions against the petitioner were that the petitioner gave Tika Ram a lift from a place outside Nahan to a spot just before the police and octroi post, that both took their meals and drank wine in the way, that when one of the prosecution witnesses, Kanhiya Lal, who was a fellow traveller with Tika Ram in the petitioner's jeep, asked the petitioner as to who Tika Ram was, the petitioner wrongly told him that he was a school master, and that the jeep though owned by one Hira Singh was mostly in the use of one Bootinath who has been stated by one of the prosecution witnesses as being a secret partner with one of the opium contractors. In order that the conviction of the petitioner could be justified on circumstantial evidence of this nature the evidence in question must be consistent with nothing but his guilt. That, I am afraid, cannot be predicated of the aforesaid circumstances relied upon by the two Courts below for the petitioner's conviction.

The said circumstances, whether taken singly or even cumulatively, do not necessarily lead to the conclusion that the petitioner was cognisant of the fact that Tika Ram, while travelling in the petitioner's jeep, was in possession of the opium in question. On the contrary, there is one circumstance which militates against even the theory of opium being in possession of Tika Ram while he was travelling in the petitioner's jeep, and that is that if in fact Tika Ram should have been carrying all that quantity of opium its presence could not have failed to be detected by its smell by the persons inside the jeep. One such person was the said prosecution witness Kanhiya Lal, but he has not given any statement to that effect. It is not inconceivable that it was between the hour of 8 p.m. on 22-9-1951, when Tika Ram got down from the jeep about two furlongs away from the octroi post, and the hour of 5 a.m. on 23-9-1951, when he was apprehended, that he came into possession of the opium in question. There is nothing in the prosecution evidence leading unmistakably to the conclusion that such a contingency was impossible. The learned Government Advocate cited a number of rulings in support of the contention that where a concurrent finding of fact has been arrived at by the Courts below the High Court should not upset such a finding merely because the evidence and circumstances on record are in the opinion of the High Court capable of leading to a different conclusion. That would no doubt be ordinarily true, but where, as in the present case, the conviction is based entirely on circumstantial evidence, and the circumstantial evidence is not such as to lead inevitably to the guilt of the accused, it would certainly be necessary for the High Court to interfere with the finding of fact in exercise of its revisional jurisdiction. However suspicious might have been the circumstances appearing against the petitioner, suspicion is not proof.

5. The revision is allowed, the conviction and sentence of the petitioner are set aside and he is acquitted. The fine, if already realised from him, shall be refunded. The petitioner is on bail, the bail bonds are discharged and he need not surrender.