

Kailash Chandra Sahu

Vs

Republic of India

Criminal Appeal No. 287 of 1977

(Syed . Murtaza Fazal Ali, A.Varadarajan JJ)

08.08.1985

JUDGMENT

S. MURTAZA FAZAL ALI, J. -

1. This appeal by special leave is directed against a judgment dated May 19, 1977 of the High Court of Orissa. By our order dated August 1, 1985 we dismissed the appeal and we now proceed to give our reasons for the same.

2. This case involves a very short point, viz., where opium is found in the licensed ganja shop of the licensee and the salesman alone was present in the shop, would the licensee be liable for having committed the offence of possession of opium ? The facts of the case have been fully narrated in the Judgments of the courts below and it is not necessary for us to repeat the same all over again. The facts clearly show that the opium was kept in the licensed shop of the appellant and the mere fact that he was absent at the time of the raid would not absolve him from criminal liability.

3. The only argument put forward by the counsel for the appellant was that as appellant was merely a licensee of the shop he could not be held responsible for anything recovered from his shop - 665 gms. of opium was recovered from the shop when the servant was present in this connection, reliance was placed on two decisions of this Court in Maharaj Prithvisinghji Bhimsinghji v. State of Bombay (AIR 1960 SC 483 : 1960 Cri LJ 672) and Radhakishan v. State of U. P. (1963 Supp 1 SCR 408 : AIR 1963 SC 822 : 1963 (1) Cri LJ 809) We have gone through these decisions but, in our opinion, they are not directly in point on the other hand, a later decision of this Court in Inder Sain v. State of Punjab ((1974) 1 SCR 215 : (1973) 2 SCC 372 : 1973 SCC (Cri) 813 : AIR 1973 SC 2309) clinches the issue on the point of law argued before us. Before going to this authority, we might refer to Section 10 of the Opium Act, 1878 (for short, referred to as the 'Act') which raises a presumption that where unauthorised possession of opium is not properly explained, there would be presumption under Section 10 that the accused had committed the offence. Section 10 may be extracted thus :

10. Presumption in prosecutions under Section 9. - In prosecutions under Section 9, it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under this Act.

4. In the case referred to above (Inder Sain case ((1974) 1 SCR 215 : (1973) 2 SCC 372 : 1973 SCC (Cri) 813 : AIR 1973 SC 2309)), an identical argument was put forward which was negatived on the ground that it is not necessary for the prosecution to show that the accused had physical custody of

opium. The Court also held that once an article is found in the possession of the accused it would be presumed that he was in conscious possession. In the instant case, it is not disputed that the shop belonged to the accused; that he was a licensee of the shop; all the goods in the shop belonged to him and were kept by him, the servant being merely in-charge of the shop whenever the appellant was absent. This Court in Inder Sain case ((1974) 1 SCR 215 : (1973) 2 SCC 372 : 1973 SCC (Cri) 813 : AIR 1973 SC 2309) observed thus : (SCC pp. 377-78, paras 16, 17, 19 & 20)

We do not think that the language of Section 10 would warrant the proposition that for the presumption mentioned in the section to arise it is necessary for the prosecution to establish conscious possession.

In our opinion Section 10 would become otiose if it were held that prosecution must prove conscious possession before it can resort to the presumption envisaged in the section. As we said Section 10 proceed on the assumption that a person who is in any way concerned with opium or has dealt with it in any manner, must be presumed to have committed an offence under Section 9 of the Act, unless the person can satisfactorily prove by preponderance of probability either that he was not knowingly in possession or other circumstances which will exonerate him. The burden to account will arise only when the accused is in some manner found to be concerned with opium or has otherwise dealt with it.

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In the last analysis, therefore, it is only necessary for the prosecution to establish that the accused has some direct relation-ship with the article or has otherwise dealt with it. If the prosecution proves detention of the article physical custody of it, then the burden of proving that the accused was not knowingly in possession of the articles upon him. The practical difficulty of the prosecution to prove something with the exclusive knowledge of the accused must have made the Legislature think that if the onus is placed on the prosecution, the object of the Act would be frustrated.

It does not follow from this that the word 'possess' in Section 9 does not connote conscious possession. Knowledge is an essential ingredient of the offence as the word 'possess' connotes, in the context of Section 9, possession with knowledge.

5. In view of the above observations the appellant cannot escape conviction as we are satisfied that he has not been able to discharge the onus that lay upon him under Section 10 of the Act. Indeed, if the argument of the counsel for the appellant is accepted then Section 10 will become otiose and there will hardly be any case in which an owner and possessor of opium can be convicted unless he is present in the shop and found to be in conscious possession. The concept of conscious possession cannot be extended too far so as to defeat the very object of Section 10 of the Act.

6. As the matter is no longer res integra and is concluded by the decision in Inder Sain case ((1974) 1 SCR 215 : (1973) 2 SCC 372 : 1973 SCC (Cri) 813 : AIR 1973 SC 2309) nothing further need be stated.

7. For the reasons given above, we dismiss the appeal and uphold the conviction and sentence of the appellant. His bail bonds are hereby cancelled and he shall now surrender and be taken into custody and sent to prison to serve out the remaining portion of his sentence.

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