ORISSA HIGH COURT

Syed Meheboob Ali

Vs

State (Orissa)

Criminal Revn. no. 168 of 1966

(G.K. Misra, J.)

02.08.1967

JUDGMENT

G.K. Misra, J.

1. The petitioner has been convicted under Section 9 (a) of the Opium Act, 1878 (hereinafter referred to as the Act) and sentenced to R.I. for one year.

2. Prosecution case is that the Excise Sub-Inspector, Barapali (p. W. 1) was suspicious of the movements of the accused-petitioner who was regularly going towards Bolangir on Fridays from Bargarh side. On 21.8-64 he kept waiting for the accused on the side of the road from Bargarh to Bolangir. While he was waiting for the accused, the Deputy Commissioner of Excise, Sri B. N. Hota (p. w. 3) came from Bolangir side in his car. While p. w. 3 was having conversation with P. W. 1, the accused came on a motor cycle from Bargarh side towards Barpali. P. W. 1 detained him and searched the bag of the accused which the latter was carrying on his motor cycle. The bag contained 3 kg. and 700 grams of contraband opium which was seized under seizure list (EX. 1). The plea of the accused is that no opium was recovered from his possession. He is an excise vendor. Other excise vendors were jealous of him as he raised the bid for obtaining license for some shops and the Excise Sub-Inspector was adverse to him as he complained against him to the Superintendent of Excise. The case has been falsely foisted on him.

3. Mr. Mohanty raised two contentions

> (i) The search and seizure were not made in presence of any respectable witnesses of the locality and were illegal; and
> (ii) The article seized was not opium.

4. So far as the first contention is concerned, the learned Courts below thoroughly examined the prosecution witnesses and accepted the search and seizure as being legal. P. W. 3 stated that P. W. 1 conducted the search in his presence. He was sitting in his car and the place of search was visible to him. He saw the opium and examined it. P. W. 1 prepared the seizure list in his

presence. Before the opium was weighed, he however, left the spot after signing the seizure list. P. W. 3 is a responsible witness. It is not necessary to refer to other evidence. It is enough to say that his evidence inspires confidence. The evidence regarding search and seizure was rightly accepted by the learned Courts below.

5. The next question for consideration is whether what was recovered from the bag of the accused was opium when the defense plea was that it was not opium. The relevant evidence in this regard may be noticed. P. W.'s version is that he identified the article as opium from smell and from his experience in the department; but he had put it to no other tests. P. W. 2, who sealed the opium, said that he for the first time smelt opium that day. P. W. 3 stated that he saw the opium and examined it to be so from his experience of 30 years in the department. Prom the look and from the smell he said that the thing was opium. He did not advise P. W. 1 to send it to chemical examiner for analysis. P. W. 2's evidence may be discarded who for the first time smelt opium on that day. P. ws. 1 and 3 belong to the Excise Department. They expressed in clear terms that the substance seized was opium and the reason given by them was that they could identify opium from its look and smell. From their long experience in the department, they claimed to have acquired the proficiency of identification of opium.

6. The position that emerges is this. If it is necessary to have chemical analysis by an expert to ascertain the identity, composition and nature of the substance whether it is opium, the petitioner would be entitled to an order of acquittal as admittedly in this case there was no chemical analysis. If, on the other hand, the opinion of the officers of the Excise Department is acceptable due to their long experience in dealing with opium, and if it is taken that such opinion establishes beyond reasonable doubt that the substance is opium, then the conviction of the petitioner is well founded. It is, therefore, necessary to make a thorough analysis as to what opium is and whether merely on the opinion of the officers of the Excise Department it would be safe to hold in a criminal case that the offence has been brought home to the petitioner beyond reasonable doubt.

7. Opium has been defined in Section 3 of the Act.

> "Section 3. In this Act, unless there be something repugnant in the subject or context, Opium means-
> (i) The capsules of the poppy (Papaver somniferum, L.), whether in their original form or cut, crushed or powdered, and whether or not juice has been extracted therefrom ;
> (ii) The spontaneously coagulated juice of such capsules which has not been submitted to any manipulations other than those necessary for packing and transport; and
> (iii) Any mixture, with or without neutral materials of any of the above forms of opium. But does not include any preparation containing not more than 0.2 per cent of morphine, or a manufactured drug as defined in Section 2 of the Dangerous Drugs Act, 1930 (2 of 1930)."

It is clear that any preparation containing 0.2 per cent of morphine is excluded from the definition of opium.
8. Section 9 (a) of the Act enacts that any person who, in contravention of this Act, or of rules made and notified under Section 5 or Section 8, possesses opium shall on conviction before a

Magistrate, be punishable with imprisonment which may extend to three years, with or without fine. Section 10 speaks of 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.

9. On the construction of Sections 3, 9 and 10 of the Act it is clear that the onus is on the prosecution to establish beyond reasonable doubt that the substance seized from the possession of the petitioner was opium. If, however, the petitioner admits the substance to be opium, or it is established by the prosecution to be opium, a presumption is raised against the petitioner and it is for him to satisfactorily account for his dealing with the opium in any of the ways referred to in Section 9. The learned Standing Counsel contended that whenever any article alleged to be opium is produced from the custody of the accused, the onus is on him to establish that it is not opium. He placed reliance on AIR 1958 Madhya Pradesh 285, which on a closer examination is against his contention. If the contention is accepted, it would lead to absurd result. The position can be clarified by an illustration. Suppose a lump of dried tamarind juice is recovered from an accused. It has some resemblance with the look of a lump of opium. Would a presumption be drawn in such a 1967 Cri. L.J. 109(1)-4 pages case against the accused that the tamarind was opium ? The answer must be in the negative. It is incumbent on the prosecution in the first instance to establish that what was recovered was opium. Then the accused would be called upon to satisfactorily account for his dealing, with such opium. The best exposition of law is given in *Iswar Chandra v. Emperor*[1]. A Division Bench of the Calcutta High Court observed thus- When once it is proved that an accused person has dealt with opium in any of the ways described in Section 9, the onus of proving that he had a right so to deal with it is thrown on the accused by Section 10. But the commission of an act which may be an offence must be proved before the presumption comes into play at all, and it cannot, therefore, be used to establish that fact. This decision represents the correct law and no decision has been brought to my notice taking the contrary view-See *Abdul Rehman v. State*[2] and *Bholanath v. The King*[3]. It is unnecessary to multiply authorities.

10. As to how to decipher whether a particular substance is opium or not, there is conflict of authority. *State v. Kaptan Singh*[4], expressed the following view.

> "Opium in the form of coagulated juice of poppy is so well known in this country being widely used for medicinal and other purposes that anyone can identify it and it is unnecessary to call in an expert to establish its identity. The testimony of the Excise Inspector cannot be looked upon in this case as merely an opinion of an expert as he did not claim to be one nor did he give any testimony as an expert. The question therefore of giving reasons for his opinion did not naturally arise."

On the opinion of the Excise Inspector that the article was opium, the conviction was based in that case. This decision has been followed in *State v. Kanhaiyalal*[5]. In the Madhya Pradesh case, the accused did not take the plea that the substance was not opium. But that apart, their Lordships held that coagulated juice of capsules of poppy is a well-known substance and at least persons belonging to districts where poppy plants are grown on license can know very well whether it is contraband opium or not. *Tejendra v. Tripura Administration*[6] and *Bodulal v. State*[7] followed the

Allahabad decision. Thus Allahabad view represents one current of thought regarding the nature of evidence for proof of opium.

11. The rival view is to be found in *Bhairulal v. State*[8]. A learned Single Judge of Rajasthan High Court observed thus-

> "In cases like the present it is the duty of the prosecution to send the article in question to the chemical examiner for chemical examination because without it, it cannot be said as to how much percentage of the substance is there which would make its possession culpable".

The matter was also examined in *In re Ayyanna*[9]. It was observed thus-

> "The substance in question must be analyzed by an expert competent to determine the composition of the vegetable matter like opium, and his opinion must be available to the Court for its consideration before a conclusion could be reached as to whether the substance in question is opium or not. This is even more important in a case like the present one where in the nature of things, the offence did not involve any mens rea, as mere possession is declared an offence".

12. After the hearing was concluded, a decision of the Supreme Court in the case of *Baidya Nath Misra v. State of Orissa*[10] came to my notice. Possibly the learned advocates on either side did not come across this decision. Therein all the authorities already referred to on the rival views were considered. The conclusions reached by their Lordships may be summed up:

> (i) There are numerous articles, such as, turpentine, kerosene, petrol etc., which a Court may identify without having to go to the trouble of subjecting them to chemical analysis. Opium happens to be one of such substances. Opium is a substance which once seen and smelt can never be forgotten, because opium possesses a characteristic appearance and a very strong characteristic scent. It is possible for people to identify opium without having to subject the product to chemical analysis;
> (ii) It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by senses then a chemical analysis may be necessary. An analysis will always be necessary if there is a mixture and the quantity of morphine contained in the
> mixture has to be established for the purpose of the definition.
> (iii) Where the evidence would show that the substance was opium and not a mixture, there was no need for chemical analysis; and
> (iv) It is necessary to determine in each case whether the evidence is of such a cogent character as to establish that the seized article was opium of the category mentioned in the second clause of the definition.

13. It is thus necessary to determine with reference to the aforesaid principles whether the

evidence in the present case establishes beyond reasonable doubt that the substance seized from the possession of the petitioner was opium. As has already been stated, the evidence in this regard is that of the Excise Sub-Inspector (P. w. 1) and of the Deputy Commissioner of Excise (P. w. 3). If the evidence of p. w. 1, uncorroborated by any other evidence, were alone on the field, it might be open to a Court of Fact to any that more cogent evidence was necessary to establish the prosecution case. The evidence of P. W. 3, who is a responsible person and against whom absolutely no suggestion has been or could be made that he had any animus against the petitioner, is acceptable in support of the finding that the seized article was opium. The reasons given by him in support of his conclusion have been discussed in para 5 of this judgment and need not be repeated. Further the learned Courts below have accepted the evidence of p. ws. 1 and 3 regarding identification of opium and there is no justification in revision to take a different view. A large quantity of opium was seized from the possession of the petitioner and the sentence is not heavy.

14. It is now necessary to notice a decision of this Court in *State of Orissa v. Basudeb*[11]. Therein it was observed thus –

> "In my opinion there can be no hard and fast rule where it should be sent to an expert or where it is not necessary to send it for determination by an expert. It all depends on the facts of each particular case".

The decision does not give any reason and does not lay down any guiding principle to be applied to the facts of any particular case. That apart, in that very case, the learned Magistrate had acquitted the accused as there was no chemical analysis by an expert without considering how far the other materials on record would by themselves be sufficient to found a conviction without chemical analysis. The learned Magistrate's judgment was affirmed in 31 cut l t 81: (1966 Cri l J 832), without also discussing the other materials on record. To that extent its correctness is open to doubt in view of the pronouncement in the aforesaid Supreme Court decision.

15. For reasons discussed the revision fails and is dismissed.
Petition dismissed.

Cases Referred.

[1](1910) 11 Cri lj 256
[2] AIR 1958 Mad Pra 285
[3] AIR 1949 Ass 73
[4] AIR 1952 All 118
[5] AIR 1964 Madh-pra 11
[6] AIR 1965 Trip 45
[7] AIR 1952 Ajmer 45
[8]1957 Cri L J 237 (Raj)
[9] AIR 1963 And Pra 334
[10] Criminal Appeal no. 270 of 1964 D/- 17.4-1967 (so)
[11]31 Cut Lt 81 : (1966 Cri LJ 832)