

(1956) 09 SHI CK 0001
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 11 of 1955

The State of Himachal Pradesh

APPELLANT

Vs

Buti Nath

RESPONDENT

Date of Decision : 24-09-1956

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 417, 423
Evidence Act, 1872 — Section 101, 102, 103, 104
Opium Act, 1878 — Section 9

Citation : AIR 1957 HP 37 : (1957) CriLJ 631

Hon'ble Judges : Ramabhadran, J.C.

Bench : Single Bench

Advocate : B. Sita Ram, for the Appellant; R.N. Malhotra and Bishan Singh, for the Respondent

Final Decision : Dismissed

Judgement

Ramabhadran, J.C.

1. The respondent, Buti Nath, as well as one Dasondhi, alias Lilu, were prosecuted by the Nahan Police of an offence u/s 8 (a) of the Opium Act. The learned Magistrate (Mr. K.B. Chandel, Additional District Magistrate) discharged Dasondhi, alias Lilu, for lack of evidence. A charge-sheet u/s 9(a), Opium Act, was, however, framed against Buti Nath.

By his order dated 31-3-1955, the learned Magistrate acquitted Buti Nath of the charge on the ground that the offence was not brought home to him beyond reasonable doubt. The State Government has come, up in appeal against the acquittal of Buti Nath u/s 417, Criminal Procedure Code.

2. The prosecution story was that on 4-1-1954 at about 1 P.M. a motor garage, situated in Mohalla Rani Tal, Nahan town, was searched by a police party, consisting of Gangbir Singh, District Inspector, Daulat Ram, Sub-Inspector, and others. Buti Nath and Dasondhi, alias Lilu, were also present, in addition to two

search witnesses, named Sewa Singh and Banda.

As a result of the search, 10 seers 3 chattaks of illicit opium was recovered, from beneath a stack of wheat straw, wrapped in a bag. On these premises, both Buti Nath and Dasondhi, alias Lilu, were prosecuted with the result, as already stated. Dasondhi was discharged and Buti Nath acquitted.

3. We are not concerned with the question as to whether Dasondhi, alias Lilu, was properly discharged or otherwise, because no revision petition against the order of discharge has been filed to this court. We are only concerned with the question as to whether Buti Nath was improperly acquitted. The burden, obviously, lies on the prosecution to show that the order of acquittal was wrong.

4. The learned Government Advocate urged that having found that the garage in question had been in the possession of Buti Nath and he used to keep jeep no. DLH 9595 therein, the Court below should have held that he (Buti Nath) was in conscious and actual possession of the opium recovered. I find, however, considerable force in the argument of the learned Additional District Magistrate that even if Buti Nath had been in possession of the garage and used to keep the jeep therein, nevertheless, the prosecution failed to establish that he was in conscious possession of the opium in question.

5. The learned Government Advocate invited my attention to an earlier ruling of this Court, reported in Bansi Lal and Others Vs. Mohi Ram and Others, where I had pointed out that:

"The best criterion for determining whether a transaction is or is not be nami is the source of purchase money."

His object in citing this ruling was to show that although the jeep stood registered in the name of one Hira Singh, nevertheless, the price thereof had been paid by the Buti Nath to the previous owner, Roshan Lal. My attention was also invited to the provisions of Section 109, Evidence Act, which deals with the burden of proof as to the relationship in cases of partners, landlord and tenant, principal and agent.

These citations do not help the appellant, because, as already remarked, even if we assume that the jeep really belonged to Buti Nath and he used to keep it in this garage and the same was in his possession, still it was incumbent upon the prosecution to establish that Buti Nath was in conscious possession of the opium in question. The learned Additional District Magistrate has referred to the statements of Hari Ram (P.W. 1), and Pola (P.W. 6), a sweetmeat seller and a hawker, respectively, who used to carry on their business in the vicinity of the garage in question.

In their examination-in-chief (which took place on 29-4-1954 and 21-5-1954 respectively), they stated that for the last four years, Buti Nath and Dasondhi used to keep the jeep in the garage, take it out and put it back. By the time, they were further cross-examined on 8-7-1954 however, both of them watered

down their previous statements and deposed that for the last one year, they had not seen Buti Nath putting in or taking out the jeep. On the other hand, the jeep was taken out by Hira Singh and Dasondhi.

6. One thing is obvious; even if we assume--as might well be justified--that after these two witnesses had been examined in chief, they had been won over by the accused, the fact still remains that in addition to Buti Nath, at least, one other person, namely Dasondhi, alias Lilu, had access to the garage.

The question that we have to ask ourselves is: Can it be said definitely that it was Buti Nath, and not Lilu, who placed the opium in the garage? The Court below answered that question in the negative and although one might be morally convinced that Buti Nath must have been aware of the presence of the opium therein, nevertheless, a, definite answer in the affirmative is not possible.

7. The case is on all fours with a Calcutta case, reported in Cyril C. Baker Vs. Emperor, (which has been referred to by the Court below). There, the facts were:

"The appellant (Baker) 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 second 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 berths. The accused was thereupon taken into custody, and was, in due course, sent up for trial and convicted and sentenced as stated."

The defence of Order C. Baker in that case was that the opium in question had been planted by a Goanese boy, who used to serve Baker and another officer. Setting aside the conviction of C. C. Baker, Graham and Panckridge, JJ., observed that:

"Possession implies knowledge, and there would be no possession when there is no knowledge on the part of the ostensible occupant of the cabin or room as the case may be. Possession without knowledge can hardly have been meant since in that case the element of criminal intention or knowledge would be entirely wanting."

"Where there is undoubtedly ground for grave suspicion regarding possession

against the accused, but the element of reasonable doubt is not excluded, 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 is upon the prosecution, and 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 connection between him and the opium, is not sufficient to discharge that onus."

8. Mr. Malhotra for the respondent also invited my attention to Venkatasubba Reddi v. Emperor AIR 1931 Mad 689 where a Division Bench of that High Court indicated that:

"In criminal case, when a set of circumstantial evidence is capable of two constructions, one in favour of the accused, and one against him, he should at least be entitled to the benefit of the doubt."

On the same analogy, it can be said here that the opium might have been introduced into the garage, either by Buti Nath or by Lilu. In the absence of clear and cogent evidence to that effect, it is not possible to say definitely that the opium was kept in the garage with the knowledge and consent of Buti Nath--although one might suspect that he might have been a party to the transaction.

9. In view of what has been said above, it is not necessary to refer to the further argument advanced by Mr. Malhotra that the recovery itself was doubtful, because the two search witnesses, Sewa Singh and Banda, were not the residents of the locality within the meaning of Section 103, Cr. P. C. I have already indicated that even on the footing that the opium had been recovered and the garage was in the possession of Buti Nath, still a conviction cannot be entered in the absence of evidence to establish a connection between Buti Nath, on the one side, and the opium, on the other.

10. Before I conclude, I may refer to two other circumstances, relied upon by the learned counsel for the appellant. One was that when the police party reached the garage, Buti Nath was asked to supply the key. At that stage, Buti Nath pleaded that the key was not with him but with Lilu. Lilu, on the other hand, maintained that the key was with Buti Nath. Eventually, the garage was opened after the kunda was removed by Buti Nath with the help of an axe, borrowed from an adjacent shop.

This course was apparently adopted at the instance of the police, although it may throw suspicion on Buti Nath, nevertheless, it would not establish affirmatively his connection with the opium. Another circumstance, referred to, was that a few hours prior to the recovery of this opium, 2 1/2 maund of illicit opium was recovered from the jeep in question, which, at that time, was---allegedly--being driven by Buti Nath.

That recovery is the subject matter of a connected case and cannot be dragged in here for the purpose of strengthening the prosecution case. In Emperor v.

Santa Singh AIR 1944 Lah 339 a Pull Bench of that High Court, with reference to a case under the Arms Act and the Explosive Substances Act, remarked that:

"The words "possession and control" in Section 19 (f), Arms Act, and Section 5, Explosive Substances Act, mean something more than mere constructive or legal possession and control. Possession and control required to constitute offences under the aforesaid sections must mean conscious possession and actual control, and as under those sections, mere possession of incriminating articles constitutes serious criminal offences, there must be mens rea or guilty knowledge before a person can be convicted of such possession.

Consequently, where incriminating articles u/s 19 (f), Arms Act, and Section 5, Explosive Substances Act, are recovered from a place in the occupation or possession of more persons than one and it is not possible to fix the liability on any particular individual, a Court is not bound to hold that the said articles were in possession or under the control of the head of the family."

On the same analogy, it is not possible to fix the liability on Buti Nath on the ground that Lilu was only his driver.

11. In State of Himachal Pradesh v. Chandan Lal AIR 1955 HP 26 following AIR 1949 HP 15 Wilayat Khan and Others Vs. The State of U.P., , Zwinglee Ariel Vs. State of Madhya Pradesh, and Prandas Vs. The State, I had pointed out that:

"In an appeal by the Government from an acquittal, it is for the appellant to show conclusively that the inference of guilt against the respondent is irresistible."

12. For reasons stated above, I am unable to hold that the connection between the respondent, Buti Nath, and the opium in question was proved conclusively. Therefore, the inference of guilt against him is not irresistible. The order of acquittal must, therefore, stand.

ORDER

13. I reject the appeal. The respondent's bail bonds in this appeal are discharged.