Supreme Court of India
Inder Sain vs State Of Punjab on 4 May, 1973
Equivalent citations: 1973 AIR 2309, 1974 SCR (1) 215
Author: K K Mathew
Bench: Mathew, Kuttyil Kurien

PETITIONER:
INDER SAIN

Vs.

RESPONDENT:
STATE OF PUNJAB

DATE OF JUDGMENT04/05/1973

BENCH:
MATHEW, KUTTYIL KURIEN
BENCH:
MATHEW, KUTTYIL KURIEN
DUA, I.D.

CITATION:
1973 AIR 2309 1974 SCR (1) 215
1973 SCC (2) 372
CITATOR INFO :
F 1985 SC1672 (3,4,6)

ACT:
Opium Act 1 of 1878, Ss. 9(a) and 10-Possession of opium when an offence under s. 9(a)-Mens rea whether a necessary ingredient-Presumption under s. 10, scope of-Presumption when displaced.

HEADNOTE:
The appellant obtained possession of a parcel purporting to contain apples after presenting before the railway authorities a railway receipt endorsed in his favour by the consignee. The parcel on being opened was found to contain a considerable quantity of opium besides apples. At his trial for an offence under s. 9(a) of the Opium Act 1878 he however denied that he had anything to do with the parcel. There was no evidence that the appellant was aware that the parcel contained opium. He was convicted by the trial court and the conviction was upheld on appeal by the Sessions Judge and on revision by the High Court. In appeal by special leave, this Court had to consider the effect of s. 10 of the Act which provide that in a prosecution under s 9 "it shall be presumed until the contrary is proved, that all the opium for which the accused is unable to account

satisfactorily is opium in respect of which he has committed an offence under this Act." The appellant contended that unless otherwise provided, it must be presumed that the legislature will not make an act an offence unless it is accompanied by mens rea.

HELD : (1) Normally, it is true that the plain ordinary grammatical meaning of the words of an enactment affords the best guide. But in cases like the present, the question is not what the words mean but whether these are sufficient grounds for inferring that Parliament intended to exclude the general rule that mens rea is an essential element in every offence. The authorities show that it is generally necessary to go behind the words of the enactment and take other factors into consideration. So. in the context it is permissible to look into the object of the legislature and find out whether. as a matter of fact. the legislature intended anything to be proved except the possession of the article as constituting the element of the offence. [218D]

Brend v. Wood, 62 T.L.R. 462-463, Sherras v. De Rutzen, I Q.B. 918 and Sweet v. Parsley, [1969] 2 W.L.R. 470, referred to.

Even if it be assumed that the offence is absolute, the word possess' in s. 9 connotes some sort of knowledge about the thing possessed. It is necessary to show that the accused had the article which turned out to be opium. It is not necessary to show in fact that he had actual knowledge of that which he had. [218E-F]

Reg. V. Ashwell, [1885] 16 Q.B.D. 190 and Reg. v. Warner, [1969] 2 A.C. 256, 289, relied on.

(ii) Section 10 proceeds 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 s. 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 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, [220D]

373SupCI/74

216

In the last analysis it is only necessary for the prosecution to establish that the accused has some direct relationship with the article or has otherwise dealt with it. If the prosecution proves detention of the article or physical custody of it. then the burden of proving that the accused was not knowingly in possession of the article is upon him. The practical difficulty of the prosecution to prove something within the exclusive knowledge of the accused must have made the legislature think that if the onus is placed on ',he prosecution, the object of the Act would be frustrated. [221C]

Lockyer v. Gibb, [1967] 2 Q.B. 243, 246, Emperor v. Santa Singh, A.I.R. 1944 Lahore 339, Sahetzdra Singh v. Emperor,

A.I.R. 1948 Patna 222, Abdul Ali v. The State, A.I.R. 1950 Assam 152, Pritam Singh and Others v. The State, 1966 P.L.R. 200, Sub-Divisional Officer and Collecor Shivasagar v. Shri Gopal Chandra Khaund and Another. A.I.R. 1971 S.C. 1190, State v. Slzam Singh and Others, I.L.R. [1971] 1 Punjab and Haryana, 130, Sheo Rai Singh v. Emperor, A.I.R. (31) 1944 Oudh 297 and Syed Mehaboob Ali v. State [1967] Cr. L.J. 1727, referred to.

(iii) In his statement under s. 342 the appellant totally denied having anything to do with the parcel. He never put forward the case that he bona fide believed that the parcel contained only apples. He was in physical custody of opium. He had no Plea that he did not know about it. Accordingly the conviction must be confirmed. [sentence altered [221F]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal. No. 44 (N) of 1970.

Appeal by special leave from the judgment and order dated December 2, 1969 of the Punjab & Haryana High Court in Criminal Revision No. 612 of 1968.

S. K. Dhingra, for the appellant.

Harbans Singh and R. N. Sachthey, for the respondent. The Judgment of the Court was delivered by MATHEW, J.-The appellant was charged by the Chief Judicial Magistrate, Sangrur, with an offence under s. 9(a) of the Opium Act. He was found guilty of the offence and sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 2,000/and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months.

The appellant appealed against the decision to the Sessions Judge, Sangrur. He dismissed the appeal. The appellant filed a criminal revision before the High Court against the order of the Sessions Judge. The revision was also dismissed.

This appeal, by special leave, is from the judgment of the High Court.

The case against the appellant was as follows. The appellant presented Railway Receipt No. 641154 dated September 22, 1967, for consignment of a parcel of apples purporting to be from one Uchara Das of Solan to one Sham Lal of Dhuri and endorsed to him by the consignee, to the parcel clerk at the Railway Station, Dhuri, and got delivery of the consignment. Head Constable Shiv Ram Singh got secret information at the Railway Station Dhuri that there was opium in the consignment. He organised a raid with the help of Pritam Singh and Mohinder Singh and stood in front of the parcel office under the bridge. While the accused was carrying the parcel, the Head Constable intervened and questioned him. The parcel was thereafter opened and it contained 4,350 gms.. of opium along

the apples. The opium was seized and its samples were put in separate containers and sealed with the seal of the Head Constable. When the report was received that the sample was opium, the appellant was challaned.

The prosecution examined Pritam Singh (PW-1), Bal Mukand, Parcel Clerk (PW-2), Mohinder Singh, Luggage Porter (PW-3), Ramji Dass, Octroi Moharrir (PW-4) and Shiv Ram Singh,. Head Constable (PW-5). PW-1, PW-3 and PW-4 did not support the prosecution c se. But on the evidence of the parcel clerk (PW-2) and the Head Constable (PW-5), it was found by the, Judicial Magistrate that the appellant was in actual possession of opium and has committed an offence under s. 9 of the Act. This finding was confirmed in. appeal and also in revision.

The question is whether the conviction of the appellant on basis of this finding for an offence under s. 9(a) was justified.

Sections 9 and 10 of the Opium Act provide :

> "9. Any person who, in contravention of this Act, or of rules made and notified under s. 5 or s. 8, (a) possesses opium, or (b) transports opium, or (c) imports or exports Opium, or (d) sells opium, or (e) omits to warehouse opium, or removes or "does any act in respect of warehouse opium, and any person who otherwise contravenes any such rule, shall, oil conviction before a magistrate, be Punishable for each such offence with imprisonment which may extend to three bears, with or without fine; and, where a fine is im- posed, the convicting magistrate shall direct the offender to be imprisoned in default of payment of the fine for a term Which may extend to six months, and such imprisonment shall. be in excess of any other imprisonment to which he may have been sentenced. "10. In prosecutions under s. 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 be has committed an offence under this Act."

It was argued that unless otherwise provided, it must be presumed that the legislature will not make an act an offence unless it is accompanied by mens rea. In Brend v. Wood(1) Lord Goddard, C.J. said "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind, that, unless a statute, either clearly or by neces- (1) 62 T. L. R. 462-463.

sary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind." In Sherras v. De Rutzen(1) it was held that s. 16(2) of the Licensing Act, 1872, which prohibits the supplying by a licensed person of liquor to a constable on duty, did not apply where the licensed person bona fide believed that the constable was off duty. Wright, J. said at p. 921 :

> "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the

> offence or by the subject matter with which it deals, and both must be considered : Nichols v. Hall (1873) L.R. 8 C.P. 322".

See also the decision Sweet v. Paraley(2) Normally, it is true that the plain ordinary grammatical meaning of the words of an enactment affords the best guide. But in cases of ,this kind, the question is not what the words mean but whether there are sufficient grounds for inferring that Parliament intended to exclude the general rule that mens rea is an essential element in every offence. And, the authorities show that it is generally necessary to co behind the words of the enactment and take other factors into consideration.. So, in the context it is permissible to look into the object of the legislature and find out whether, as a matter of fact, the legislature intended anything to be proved except the possession of the article as constituting the element of the offence. Even if it be assumed that the offence is absolute, the word 'possess' in s. 9 connotes some sort of knowledge about the thing possessed. So we have to determine what is meant by the word 'possess' in the section. The question is whether the possessor of a parcel is necessarily in possession of everything found in it.. The, word 'possess' is not crystal clear. There is no clear rule as to the mental element required. In Reg. v.

Ashwell(3) it was held that a person who received a sovereign thinking it to be a shilling cannot be said to possess 'he sovereign until the mistake was discovered. It is necessary to show that the accused had the article which turned out to be opium. In other words, the prosecution must prove that the accused was knowingly in control of something in circumstances which showed that he was assenting to being in control of it. It is not necessary to show in fact that he had actual knowledge of that which he had (see the observations of Lord Morris in Reg. v. Warner (4).

Lord Justice Parker said in Lockyer v. Gib (5):

> "In my judgment it is quite clear that a person cannot be said to be in possession of some article which he or she (1)IQ. B. 918.
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> (2) [1969] 2 W. I. R. 470.
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> (3) [1835] 16 Q. B. D. 190.
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> (4) [1969] 2 A. C. 256, 289.
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> (5) [1967] 2 Q. B. 243, 248.
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> does not realise, is, for example, in her handbag, in her room, or in some other place over which she has control. That I should have thought is elementary; if something were slipped into your basket and you had not the vaguest notion it was there at all, you could not possibly be said to be in possession of it."

In Reg. v. Warner(1), the House of Lords was concerned with the question whether the appellant there was in unauthorised possession of a scheduled drug and it was held that it is not necessary to

prove mens rea apart from the knowledge involved in the possession of the article. Lord Reid dissented. The majority decision would show that in a case of this nature, it is not necessary for the prosecution to prove that the accused had consciousness of the quality or the nature of the thing possessed and that it would be sufficient if it is proved that a person was knowingly in possession of the article. Lord Morris of Borth-y-Gest said :

> "Must the prosecution prove that an accused had a guilty mind ?
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> It is a declared purpose of the Act to prevent the misuse of drugs. If- actual possession of particular substances which are regarded as potentially damaging is not controlled there will be danger of the misuse if Them by those who possess them. They might be harmfully used; they might be sold in most undesirable ways. Parliament set out therefore to 'penalise' possession. That was a strong thing to do. Parliament proceeded to define and limit the classes and descriptions of people who alone could possess. All the indications are that save in the case of such persons Parliament decided to forbid possession absolutely".

We think that the only question for consideration here is whether the appellant was in possession of opium. It was held in a number of rulings of the various High Courts that if possession of an article is made an offence, then there must be proof that the accused was knowingly in possession of the article. gee the decisions in Emperor v. Santa Singh(2), Sahendra Singh v. Emperor(3), Abdul Ali v. The State(4), Pritam Singh and Others v. The State(5) and Sub- Divisional Officer and Collector, Shivasagar v. Shri Gopal Chandra Khaund and Another(6).

It is true that prosecution has not adduced any evidence to show that the appellant was knowingly in possession of 'opium. The appellant took the endorsement of the Railway Receipt from the consignee, and presented it before the parcel clerk and obtained the parcel.

(1) [1969] 2 A. C. 256. (2) A. I. R. 1944 Lahore 339. (3) A. I. R. 1948 Patna 222.(4) A. I. R.1950 Assam 152. (5) 1966 P. L. R. 200. (6) A. I. R. 1971 S. C. 1190. 22 0 There is, strictly speaking, no evidence that the appellant was aware that the parcel contained any contraband substance, much less opium.

But it is said on behalf of the prosecution that in most cases of unauthorised possession of opium the prosecution will never' be able to prove that the accused was knowingly in possession of the article and that the burden to prove that he was not in conscious possession is upon the accused by virtue of s. 10 of the Act. That section seems to proceed on the assumption, if it is proved that the accused had something to do with opium, then the burden of proof that he has not committed an offence will be upon the accused. In other words, when once it is proved in--a' prosecution under s. 9 of the Act that the accused was in physical custody of opium, it is for the accused to prove satisfactorily that he has not committed an offence by showing that he was not knowingly in possession of opium. It would, therefore, appear that the prosecution need only show that the accused was directly concerned in dealing with opium. If the prosecution shows that the accused had physical custody of opium, then, unless the accused proves by preponderance of probability that he was not in conscious

possession of the article the presumption under S. 10 would arise. We do not think that the language of s. 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 s. 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 proceeds 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 s. 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.

In State v. Sham Singh and Others(1), Gurdev Singh, J. speaking about s. 10 observed "Section 10 of the Opium Act, in my opinion, implies that a person who is in any way concerned with opium that forms the subject matte r of prosecution or has otherwise dealt with it in any manner go as to render him accountable for it will be presumed to have committed an offence under S. 9 of the Opium Act unless he can 'account satisfactorily" for it."

(1) I. L. R. (1971) 1 Punjab and Haryana

130. in Sheo Raj Singh v. Emperor(1), it was held "Section 10 expressly throws upon the accused the burden to account for opium in respect of which he is alleged to have committed an offence."

Practically the same view was taken in Syed Mehaboob All v. State(2).

In the last analysis, therefore, it is only necessary for the Prosecution to establish that the accused has some direct relationship with the article or has otherwise dealt with it. If the prosecution proves detention of the article or physical custody of it, then the burden of proving that the accused was not knowingly in possession of the article is upon him. The practical difficulty of the prosecution to prove something within 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 s. 9 does not connote conscious possession. Knowledge is an essential ingredient of the offence as the word 'possess' connotes, in the context of s. 9, possession with knowledge. The legislature could not have intended to make mere physical custody without knowledge an offence. A conviction under s. 9 (a) would involve some stigma and it is only pro- per then to presume that the legislature intended that possession must be conscious possession. But it is a different thing to say that the prosecution should prove that the accused was knowingly in possession. It seems to us that by virtue of s. 1 0, the onus of proof is placed on the accused when the prosecution has shown by evidence that the accused has dealt with the article or has physical custody of the same, or is directly concerned with it, to prove by preponderance of probability that he did not knowingly possess the article.

In his statement under s. 342, the appellant totally denied having anything to do with the parcel. He had no case that to his knowledge the parcel contained anything other than apples. He never put forward the case that he bone fide believed that the parcel contained only apples. He was in physical custody of opium. He had no plea that he did not know about it.

We are, therefore, inclined to confirm the conviction and we do so.

As regards the question of sentence, in view of the fact that the appellant has already undergone a part of the sentence of rigorous imprisonment and was on bail from March 3, 1970, we do not think it proper to send him to jail again. In the circumstances we think that the period of imprisonment already undergone by him together with a fine of Rs. 2,500/- would be adequate sentence. If the fine is not paid, the appellant will be liable to imprisonment for a period of six months.

The appeal is allowed only to the extent indicated but dismissed in all other respects.

G.C.

(1) A. I. R.(31) 1944 Oudh 297.

(2) (1967) Cr. L. J. 1727.