

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

JUDGMENT

KHEMRAJ VS. STATE OF RAJASTHAN

**“S.B. CRIMINAL APPEAL No.89/1989
UNDER SECTION 8 READ WITH 18 OF
THE NARCOTICS DRUGS AND
PSYCHOTROPIC SUBSTANCES ACT,
1985 AGAINST THE JUDGMENT
DATED 07.02.1989 PASSED BY THE
LEARNED SESSIONS JUDGE,
PRATAPGARH IN SESSIONS CASE
NO.21/1988.”**

DATED : 30th August, 2010

P R E S E N T

HON'BLE MR.JUSTICE KAILASH CHANDRA JOSHI

Mr.Kalu Ram Bhati, for the appellant.
Mr.N.K.Rai Special P.P.

BY THE COURT:-

This appeal has been preferred by accused appellant Khem Raj S/o Uda b/c Raigar, Resident of Kazli, Police Station Rathanjna, District Chittorgarh against the judgment of conviction and order of sentence passed by learned Sessions Judge, Pratapgarh in Sessions Case No.21/1988, whereby the accused appellant was held guilty for the commission of offence under Section 8 read with Section 18 of the

Narcotic Drugs & Psychotropic Substances Act, 1985, and sentenced to 10 years rigorous imprisonment and a fine of Rs. One Lac and in default of payment of fine, to further undergo two years rigorous imprisonment.

The nub of the prosecution story is that on dated 30.12.1987, a reliable information was received by District Central Narcotics Officer that the opium was lying in the house and field of Khemraj. On this information, District Central Narcotics Officer constituted a team comprising of Yashpal Singh Tyagi, Inspector and other officers of the Narcotics Department. They started towards Kazli village and came to the knowledge that Khemraj was on his well. The team of the Narcotics Department reached the well of Khemraj and there, they conducted a search and found the opium in the roots of a Babool tree and later they came to residence of Khemraj and conducted the search of residential house of Khemraj and found opium weighing 7 Kg 300 gms in the drum lying in the '*Padsal*'. As there was no suitable arrangement of light, the seizure memo and other procedural steps were put into black and white at the '*Chakki*'. After usual procedure, the raid party came to Chittorgarh. Some of the opium was kept as sample and that was sent for chemical examination in the Forensic Science Laboratory. After receiving the report and after recording the statements of the witnesses, a charge sheet was filed, in the Court of Chief Judicial Magistrate, Chittorgarh from where case was committed for trial to the Court of District & Sessions Judge, Pratapgarh. Two

separate charge sheets were filed, one for possession of the opium at the field of accused and another was filed for keeping the opium in the house. This case relates to the possession of the opium in the house of the accused appellant.

Accused appellant was charged for the commission of offence under Section 8 read with Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 and the prosecution examined as many as 7 witnesses, during the course of investigation, the incriminating evidence produced by the prosecution was put for explanation under Section 313 of the Cr.P.C. and accused adduced no evidence in his defence.

The learned trial court vide judgment dated 07.02.1989, held the accused appellant guilty for the commission of offence under Section 8 read with Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 and sentenced as above.

In the memo of appeal, learned counsel for the accused appellant contended that learned trial court erred in holding the accused appellant guilty for commission of offence charged because there was no iota of evidence regarding the actual, conscious and exclusive possession over the house of the accused appellant. It was further

contended that there was no reliable evidence on record that house was owned or possessed by the accused appellant and, therefore, appellant could not be attributed to any physical possession much less conscious possession of the opium. It was further contended in the memo of appeal that P.W. 1 Yashpal Singh Tyagi was having no personal knowledge about the possession or ownership of the disputed house because as per his statement he derived the knowledge from Sarpanch about ownership and possession of the house but the Sarpanch had not been examined in the evidence by the prosecution and the Panchs, who were present at the time of seizure, had not corroborated the evidence of the witnesses of the raid party. When there was no evidence regarding possession of house based on personal knowledge, the prosecution must be held to have failed to prove conscious and exclusive possession or ownership of accused appellant.

In this appeal the main argument, which has been advanced by the learned counsel for the appellant, is that from the documentary evidence as produced by the prosecution, as well as from the oral evidence on record, the fact that opium which was alleged to have been recovered in the present case, was in conscious possession of the accused appellant, has not been proved by the prosecution. In other words, prosecution has not been able to prove that at the time of recovery, the concerned place from when opium was recovered, was in exclusive possession of the accused appellant. The learned counsel

contended the same argument, as pleaded in the memo of appeal.

On the other hand, the learned counsel for the Narcotics Department supported the impugned judgment and order passed by the learned District Judge, Pratapgarh.

I have heard the learned counsel for the accused appellant and the learned counsel for the Narcotics Department and perused the record of the case.

To appreciate the above contentions raised by both the learned counsel , the evidence and documents of the present case have to be seen and evaluated.

Material witnesses , adduced by the prosecution pertaining to the fard of search and seizure , Ex.P/1, site preparation memo Ex.P/5, were PW/1 Yashpal Singh Tyagi, PW/2 Om Prakash, PW/3 Jagdish Prasad, PW/5 Dilip Singh , PW/6 Radhey Shyam and PW/7 Govind Singh.

PW/1 Yash Pal Singh Tyagi was the Inspector of Narcotics Bureau on 30.12.1987 and he corroborated the prosecution story regarding the search of the house of the accused appellant and also admitted the execution of all *fards*.

PW/2 Om Prakash and PW/3 Jagdish Prasad Sharma were the members of the search party and both these witnesses corroborated the evidence of PW/1 Yash Pal Singh and admitted their signature on all *fards*.

PW/4 Basant Kumar Mogra, was District Opium Officer of Narcotics Bureau, Chittor on 30.12.1987 . He was the Officer who constituted the raid party and directed PW/1 Yash Pal Singh to conduct raid. This witness further deposed that after receiving the report of the Forensic Science Laboratory, he filed the charge sheet in the competent court.

PW/5 Dillip Singh Jain also corroborated the evidence of PW/1 Yash Pal Singh , PW/2 Om Prakash and PW/3 Jagdish and further deposed to carry the samples of the opium in the sealed condition and to deposit it in Neemach.

PW/6 Radhey Shyam and PW/7 Govind Singh both motbirs of the recovery of opium, had been declared hostile because they did not corroborate the fact of recovery of opium from the residence of accused appellant Khemraj.

Looking to the above evidence , following factual position emerges:-

(1) That PW/1 Yash Pal Singh and his party went to the field and residence of the accused appellant, on secret information to the effect that the accused appellant was having opium in his field.

(2) That during search, opium was found from the field.

(3) That the opium was also found from the residence.

(4) Accused appellant opened the 'kundi' of the door of the residence.

(5) Opium was found in a drum lying in the 'Padsal' not accessible to all.

(6) Both motbirs had been declared hostile

(7) Sarpanch who identified the residence of accused appellant, had not been examined.

Now, the question for consideration is, whether in the facts just discussed in earlier paras, and the circumstances of the case, exclusive conscious possession over the house in question, can be said to be of accused appellant or not ?

Proof of possession is essential for convicting any person under section 8 read with section 18 of NDPS Act. In this respect, it may be stated that the term 'possession' has not been defined in the Act. We have to seek the help of judicious decisions pronounced by Hon'ble apex Court. Hon'ble Supreme Court in *Madan Lal vs. State of H.P.*

Reported in (2003) 7, SCC, 465 held that expression “possession” is a polymorphous , term which assumes a different colour in different contexts. It may carry different meanings in contextually different backgrounds. Possession in a given case, need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given, holds it subject to that power or control. The words “ carries” means awareness about a particular fact. It is a state of mind which is deliberate or intended.

In view of above observations of Hon'ble Apex Court, it is clear that possession is made up of two elements;

Firstly, the corpus- the element of physical control and secondly, the animus or intent with which such control is exercised. It is conscious possession, which is contemplated by penal statute, which promotes and penalises possession of any contraband article or thing. Thus, corpus, without animus, is ineffective, but if animus is established it does not matter whether the possession is actual or constructive.

It leads to the conclusion that in possession there is a necessary mental element of intention, in motive, a sufficient knowledge of the presence of the contraband article by the accused.

Applying the above principles the present case is being examined.

Learned counsel for the accused appellant has not disputed that the article recovered / seized was opium.

PW/5 Dilip Singh very well proved that intact sealed sample received by him was deposited in same sealed condition, which is further fortified from receipt as well as Ex.P/12, report of Government Opium & Alkaloid Works , Neemuch (M.P.). PW/4 Basant Kumar Mogra was the District Narcotic Officer, who also proved this fact. Contents of Ex.P/12, (Report of examination of contraband opium), are- admissible with out proof, therefore, on the basis of report Ex.P/12, it stands proved that the item recovered from alleged residence of Khemraj was opium.

The only contention raised before the Court is about the conscious possession. Learned counsel Mr.K.R.Bhati contended that motbirs have turned hostile and PW/1 to PW/3 had no personal knowledge about ownership or possession of the house, from where opium was recovered. He placed reliance on the following authorities:-

- (1) 2002 (1) Cr.L.R. [Raj.] 239 Raghuveer Singh vs. State of Rajasthan
- (2) 2004 (2) Cr.L.R. [Raj.] 1158 Hanuman Das vs. Union of India.

I have perused the above citations referred by the learned

counsel for the accused appellant. In the case of Hanuman Das vs. Union of India (supra), the opium was recovered from the house having joint possession over it and particularly from the bed room of the married son. In case of Raghuveer Singh vs. State of Rajasthan (supra), the recovery was made from the open *kacha* house. Thus, the facts of the present case are different from the citations referred above.

PW/1 Yashwant Singh Tyagi, PW/2 Om Prakash, PW/3 Jagdish and PW/4 Dilip Singh were not inimical to the accused. Their testimony cannot be discarded merely because they were the employees of Narcotic Department. Their statement substantially corroborates each other. It has come in their evidence that it was a close door house and accused appellant opened '*kundi*'. Had it been a house of somebody else, he would have refused to do so because he could have no authority to give entry to Narcotics Personnels in another's house. Further, without raising any objection, he signed search and seizure memo Ex.P/4, as also site plan Ex.P/9, wherein it is averred that the house belongs to the accused. When charge was explained to accused, he simply denied it but no specific defence about possession was taken. It is only at a belated stage that possession over house in question was raised. Further, the recovery was made from close door house, further opium was in hidden position in a drum.

PW/6 Radhey Shyam and PW/3 Govind Singh are co-villagers.

It often happens that a man comes forwards to help in the legal proceedings but then his affinity towards co-villagers makes him to resile from his own earlier version. Radhey Shyam and Govind Singh also resiled from their earlier version without giving any plausible reason for putting their signatures on Ex.P/4 and Ex.P/9, which contains that the house in question was that of the accused appellant Khemraj.

Ownership of the house in such cases, cannot have much relevance. PW/1 Yash Pal Singh Tyagi proved that there was a stone built all between houses of Chunnilal and Khemraj. He also proved that the opium was found in the '*padsal*', which is not easily visible place, therefore, the principle purported by Hon'ble Supreme Court in *Madan Lal vs. State of H.P.* Reported in (2003) 7 SCC 465, are also attracted and the accused must be held guilty for possession of article, which was further proved to be opium, on it's chemical analysis.

Resultantly, in view of the aforesaid discussions made, the appeal preferred by accused appellant Khem Raj s/o Uda, b/c Raigar is dismissed and the judgment of conviction and order of sentence passed by learned Sessions Judge, Pratapgarh in Sessions Case No.21/1988, is maintained.

Record of the learned trial court be sent forthwith, to serve the

sentence as awarded by the learned trial court. The accused appellant is directed to surrender before the learned trial Judge.

(KAILASH CHANDRA JOSHI), J.

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