

(1998) 03 RAJ CK 0076

Rajasthan High Court

Case No: Criminal Appeal No. 432 of 1996

Girdhari Nath

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision: March 6, 1998

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 374
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 18, 2, 50, 54, 8

Citation: (1999) 1 ACR 545

Hon'ble Judges: P.C. Jain, J

Bench: Single Bench

Judgement

P.C. Jain, J.

The Appellant has filed this appeal u/s 374, Code of Criminal Procedure against the order dated 18.7.1996, of the Special Judge (A.D.J.), Jhalawar, Camp Aklera, by which the accused-Appellant was found guilty of an offence punishable u/s 8 read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the Act) and sentenced to ten years rigorous imprisonment and a fine of Rs. 1,000, in default of payment of fine, the accused was ordered to undergo rigorous imprisonment for six months. Since the learned Counsel for the Appellant has argued the appeal on one point, I am only narrating the essential facts which are relevant for. appreciating the above argument.A. Cr.R. 35 2. Nand Lai Rai. P.W. 3, along with his party went to the house of the accused to conduct a search and after search, recovered opium pots pieces weighing 419 kgs. He also found some water boiling in which a few earthen pieces of pot pieces were lying. According to him, the accused imd collected the above pieces in ^which opium were adhering to the above pieces and by boiling the same, he was extracting the same in the water. He seized the above articles. Before taking search, Shri Nand (Lai Rai, gave statutory notice required u/s 50 of the Act to the Appellant that if he desired, the search could

be taken before a Gazetted Officer or a Magistrate. The accused expressed his desire to be searched by Shri Nand Lai Rai. Before taking search, Shri Nand Lai Rai also summoned two respectable and independent witnesses. The above pieces were filled in nine bags and he took two samples, of one kg. each and sealed the same. The remaining pieces were also sealed. The above articles were deposited in the Malkhana. Therefore, he sent the sample to the Government Opium and Alkaloid Works, Neemuch (M. P.) for chemical examination. Vide report Ex. P. 24, the Chemical Examiner opined that each of the two samples answers for opium qualitatively. After, receipt of the report, a charge-sheet was filed against the accused.

2. A charge u/s 8 read with Section 18 was framed against the Appellant. The accused-Appellant pleaded not guilty and claimed to be tried. The prosecution produced in all nine witnesses. The learned special Judge after appreciating the evidence of the witnesses and taking into consideration the various documents, including the report of the Chemical Examiner, came to the conclusion that the accused was found in possession of earthen pot pieces containing opium. He, therefore, convicted and sentenced the accused as stated above.

3. Learned Counsel for the Appellant has assailed conviction and sentence of the accused on the ground that the report of the Chemical Examiner Ex. P. 24, cannot be said to have given a positive finding regarding opium in the sample taken by Shri Nand Lai Rai. The report is hardly of any importance. The report does not give the percentage of morphine found in the articles which are alleged to have been seized or recovered from the house of the accused. If the report of the Chemical Examiner, Ex. P 24 is ignored, the whole prosecution case collapses and the accused is entitled to acquittal. In this connection, learned Counsel referred to the definition of opium" as given in Section 2(xv) of the Act, which reads as under: "(xv) opium means (a) the coagulated juice of the opium poppy, and (b) any mixture, with or without any natural material, of the coagulated juice of the opium poppy, but does not include any preparation containing not more than 6.2 per cent of morphine."

4. Learned Counsel has, therefore, submitted that the report Ex. P. 24 was erroneously taken into consideration by the learned Sessions Judge and on that basis, it was held that the sample taken from the earthen pot, which is alleged to be recovered from the possession of the accused was positive for opium. Learned Counsel had placed reliance on Union of India v. Lalit Baruah and Ors. 1998 (1) Crimes 65.

5. Learned Public Prosecutor/" has tried to support the judgment of the learned Sessions Judge on the ground that the report Ex. P. 24 of the Chemical Examination definitely shows that after test the Chemical Examiner found the same positive for presence of essential ingredients of opium though, the exact percentage of morphine has not been indicated.

6. I have considered the rival contentions. In *Union of India v. Lalit Baruah and Ors.* (supra), it was held that if after Chemical Examination percentage of morphine contents is not indicated and only it is stated that the test was found positive for opium, the report is not in accordance with law. It was held that the presumption u/s 54 of the Act can also not be invoked in such a case.

7. A perusal of the above report shows that the articles sent for Chemical Examination were found positive for opium. However, the Chemical Examiner has not indicated the percentage of morphine found in the sample. It was expected of the Chemical Examiner to have indicated the percentage of morphine found by him inasmuch as unless he found presence of morphine, he could not have shown the sample positive for opium. The Chemical Examiner unfortunately ignored this basic requirement of law. His report, therefore, cannot be accepted to be a positive report, regarding the finding of opium in the sample.

8. For the above reasons, I find substance in the contention of the learned Counsel for the Appellant. The report Ex. P. 24, cannot be accepted because, it does not contain the percentage of morphine found in the sample, 1, therefore, accept the appeal, set aside the order of the learned Sessions Judge and acquit the accused to the offence u/s 8 read with Section 18 of the Act. The accused is in Judicial Custody. He shall be released forthwith, if not required in any Ors. case.