REVISIONAL CRIMINAL

Before S. C. Mital and D. S. Tewatia, JJ.

JOGINDER KAUR—*Petitioner.*

versus

STATE OF PUNJAB—*Respondent.*

Criminal Revision No. 50-R of 1974

March 31, 1978.

Opium Act (1 of 1878)—*Section* 9—*Code of Criminal Procedure* (2 of 1974)—*Section* 293—*Person accused of an offence under section* 9—*Whether entitled to require the Court to send an additional representative sample of opium to a public analyst.*

Held that a person accused of an offence under section 9 of the Opium Act 1878 has no right to require the court to send an additional representative sample of the substance recovered from his possession for opinion either to the public analyst who had submitted his report on a representative sample sent to it by the prosecution or to any other public analyst on any abstract principle of the accused's right to lead defence to rebut the evidence adduced against him by the prosecution. The evidence of such experts whose reports are made admissible as piece of evidence under section 293 of the Code of Criminal Procedure 1973 stands on a different footing. It is not open to an accused in such cases to have the facts found again either by the same expert or by another expert. Such a right does not exist in abstract. In cases where the law makers have felt the necessity of conferring such a right on an accused they have expressly provided therefor, as is the case in regard to the cases arising under the Prevention of Food Adulteration Act 1954.

(Paras 11 and 12)

Case referred by Hon'ble Mr. Justice D. S. Tewatia, on July, 27, 1977 *to a larger Bench for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble Mr. Justice S. C. Mital and Hon'ble Mr. Justice D. S. Tewatia finally decided the case on* 31*st March,* 1978.

Case reported under section 438 *Cr. P. C.,*—vide *order of Shri H. S. Chaudhry, Additional Sessions Judge, Faridkot, dated* 3rd *November,* 1973 *for revision of the order of the Court of H. S. Khushdil, Judicial Magistrate* 1*st Class, Moga, dated* 19*th April,* 1973 *dismissing the application of the applicant for sending sample out of bulk opium for analysis by the public Analyst Calcutta, in F.I.R. No.* 185 *of* 1970 *under section* 9 *of the opium Act, P.S. Baghapurana.*

K. S. Doad, Advocate with Gurprit Singh Doad, Advocate, *for the petitioner.*

D. N. Rampal D.A.G. (Pb.) *for the respondent.*

JUDGMENT

D. S. Tewatia, J.

(1) This recommended revision petition came up before me in the first instance. I referred it to a larger Bench and that is how it has been placed before us.

(2) The short, but important, question that falls for determination in this case is as to whether a person accused of an offence under section 9 of the Opium Act is, in law, entitled to require the Court trying the case to send an additional representative sample of the opium recovered from his possession to the Public Analyst, Calcutta, or for that matter, to the Public Analyst of any other State, for analysis and submit his report in his defence by way of rebuttal of the conclusions contained in the report of the Public analyst submitted after analysis of the representative sample sent to it by the prosecution.

(3) The facts relevant to the determination of the aforesaid question in this case are that 5 Kilograms and 800 grams of opium was recovered from the possession of the petitioner. A representative sample out of the aforesaid bulk of opium was sent to the Chemical Examiner of the Punjab who opined that the substance sent to him was opium. The prosecuting Sub-Inspector closed the prosecution case on 7th February, 1973.

(4) The petitioner examined one witness on 30th March, 1973 after having made a statement under section 342, Cr. P. C., and on the same date he moved an application requiring the Court to send an additional sample to the Public Analyst, Calcutta, for expert opinion. A decision of this Court reported in *Surjit Singh* v. *The State of Punjab*, (1), was pressed in support of the submission contained in the application.

(5) The trial Court distinguished the said decision on the ground that that was a case in which four lots of opium were recovered from the possession of the accused and a sample taken out only from one lot was sent. The accused's application for sending samples from the other three lots for opinion to the Public Analyst was considered reasonable and was allowed, but in the present case the opium in

(1) 1972 P.L.R. 830.

question was recovered in one lot and so the trial Court considered that the ratio of the said decision did not cover the facts of the present case.

(6) The learned Sessions Judge, before whom a revision was preferred against the aforesaid order of the trial Court, took a different view and has recommended the setting aside of the trial Court's order and for the granting of the application of the petitioner.

(7) Mr. Karnail Singh Doad, learned counsel for the petitioner, has placed reliance on the following three reported and one unreported decision of this Court :

(1) *Madan Lal* v. *The State of Punjab,* (2).

(2) *Surjit Singh* v. *The State of Punjab,* (supra).

(3) *Inder Singh* v. *The State of Punjab,* (3), and

(4) *Balu Ram* v. *The State of Punjab* (4).

Sodhi, J. who decided *Madan Lal's case* (supra), gave no reasons for his conclusion that the accused was entitled to have the right to ask the Court to send an additional representative sample of the substance recovered from him to the Public Analyst of another State for opinion. The learned Judge, however, distinguished an earlier decision of this Court in *Karnail Singh* v. *The State,* (5), rendered by Shamsher Bahadur, J., on the ground that in that case the accused-petitioner had asked the Court to send the entire bulk of the substance recovered from him for analysis, while that was not the request of Madan Lal petitioner before him (Sodhi, J.), who merely wanted an additional representative sample of the substance recovered from him to be sent to the Public Analyst of another State for opinion.

(8) Gujral, J., who decided *Surjit Singh's case* (supra), merely followed the decision in *Madan Lal's case.*

(2) 1970 Cur. L. J. 864.
(3) 1973 C.L.R. 561.
(4) Cr. R. 219-R/72 decided on 17th March, 1977.
(5) 1966 P.L.R. 657.

(9) Suri, J., who decided *Inder Singh's case,* supra, besides following the aforesaid two decisions, reasoned that the report of the Public Analyst was not conclusive and that the accused had a right to lead defence to prove the incorrectness of the report of the Public Analyst relied upon by the prosecution. This he could do only by requiring the Court to send an additional representative sample of the substance recovered from him for the opinion of another Public Analyst.

(10) Sharma, J., who decided *Balu Ram's case* (supra) reasoned that a person accused of an offence had a right to produce any defence which he liked and, therefore, in a case like the one before him the accused had a right to have the sample of the opium alleged to have been recovered from his possession tested by the Public Analyst.

(11) After giving careful consideration to the matter, with respect we find ourselves unable to accede to the view that a person accused of an offence under section 9 of the Opium Act has any right to require the Court to send an additional representative sample of the substance recovered from his possession for opinion either to the Public Analyst, who had submitted his report on a representative sample sent to it by the prosecution, or to any other Public Analyst, on any abstract principle of the accused's right to lead defence to rebut the evidence adduced against him by the prosecution, for, in our opinion, evidence of such experts whose reports are made admissible as piece of evidence under section 510 of the old Code and under section 293 of the New Code, stands on a different footing. For instance, no accused person in a murder case has a right to ask the Court to preserve the deadbody for second post-mortem by either the very doctor who had conducted the post-mortem earlier at the request of the police, or by any other expert doctor of his choice, in an effort to use the report of the latter post-mortem for the purpose of rebuttal of the post-mortem report of the doctor who conducted the post-mortem at the request of the police.

(12) In regard to the experts, whose reports have been made admissible in law as piece of evidence by the aforesaid provisions of the Criminal Procedure Code, the only right that the accused has is to request the Court to call the expert for cross-examination and then test his competency as an expert or to have any vagueness in the report clarified. By doing so, the accused can create doubt in the competency of the Analyst or expose the vagueness of the report

and thus erode the evidentiary value of the report or for that matter of the evidence of the expert. The accused also has a right to examine an expert witness of his choice to challenge the opinion expressed by the expert (one whose report or testimony the prosecution relies) on the basis of the facts found by him. He can also rebut the said opinion with the aid of authoritative text books. However, what is not open to an accused in such cases is to have the facts found again either by the same expert or by another expert. Such a right does not exist in abstract. In cases where the law-makers have felt the necessity of conferring such a right on an accused they have expressly provided therefor, as is the case in regard to the cases arising under the Prevention of Food Adulteration Act, where under section 13, which is in the following terms, an express right has been conferred on an accused to have the other sample sent to the Director of the Central Food Laboratory, who is a superior authority and whose opinion has expressly rendered conclusive superseding the one expressed by the State Public Analyst:

"13. (1) * * * * * *

(2) On receipt of the report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any, whose name, address, and other particulars have been disclosed under section 14-A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the Court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory.

* * * * *

(3) The certificate issued by the Director of the Central Food Laboratory under sub-section (2B), shall supersede the report given by the Public Analyst under sub-section (1).

* * * * *

No such right has been conferred by the Opium Act. In the absence of any such right being conferred on the accused under the Opium Act, the trial has to proceed against her in accordance with the provisions of the Criminal Procedure Code.

(13) For the reasons stated, we find no merit in this revision petition and dismiss the same.

S.C. Mital, J.—I agree.

K. T. S.

APPELLATE CIVIL

Before R. N. Mittal, J.

MELA RAM—(*Claimant*)—*Appellant.*

versus

MOHAN SINGH, ETC.—*Respondents.*

F.A.O. No. 358 *of* 1971

April 3, 1978.

Motor Vehicles Act (IV of 1939)—Section 110-D—Rule of 'res ipsa *loquitur'—Meaning of—Accident due to bursting of tyre—Negligence—Whether to be proved by the claimant.*

Held that in claims for damages, in accident cases, normally the rule is that it is for the claimant to prove negligence. In some cases the above principle may cause hardship to the claimant, because it may be that the true cause of the accident lies solely within the knowledge of the respondent who caused it. This hardship is, however, avoided to a considerable extent by the maxim of *res-ipsa loquitur*. The maxim means that an accident may by its nature be more consistent with its being caused by negligence for which the respondent is responsible than by any other causes, and that in such a case the mere fact of the accident is *prima facie* evidence of such negligence. In such cases it is sufficient for the claimant to prove accident and therefrom a presumption of negligence arises. The onus then shifts on the respondent to show that the accident could not be avoided at any cost.

(Para 4)