

maintenance against any person neglecting to maintain his legitimate or illegitimate child. Thus if a parent is under an obligation to maintain his illegitimate child there is no reason why the illegitimate child should not be entitled to compensation from the person responsible for the death of the parent. There is no justification whatever for introducing the qualifying word 'legitimate' to prefix the word child in section 1-A of the Fatal Accidents Act.

(5) The learned Subordinate Judge assessed the damages at Rs 7,000 in case the plaintiffs were to be held to be entitled to damages. No argument was advanced before me regarding the assessment of damages. The judgment and decree of the learned Subordinate Judge are set aside. There will be a decree in favour of the plaintiffs for Rs. 7,000 with interest at 6 per cent from the date of suit. The plaintiffs will receive proportionate costs from the defendants both here and in the lower Court. The Court fee due to the Government will be paid by the plaintiffs.

K. T. S.

APPELLATE CRIMINAL

*Before S. S. Sandhwalia and S. P. Goyal, JJ.*

The STATE OF PUNJAB,—Appellant.

*versus*

RAM PARKASH,—Respondent.

*Criminal Appeal No. 1276 of 1973*

May 17, 1977.

*Opium Act (13 of 1857)—Section 9—Criminal Procedure Code (II of 1974)—Section 100—Failure of raiding party to join independent witnesses—Whether makes the prosecution case suspicious or unreliable.*

*Held*, that there being no provision of law requiring the attendance of any independent witness at the time of the search of the person of a suspect, the recovery proceedings cannot, therefore, be held to be suspicious or unreliable merely because no independent witness was opted to join the raiding party. At best, it would be

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a suspicious circumstance which would require the Court to scrutinise the prosecution evidence with more caution and care but in no case by itself it can warrant the discredit of the prosecution case. (Para 6)

Dalip Singh vs. The State (1973 C.L.R. 398) OVERRULED.

*Appeal against the order of Shri J. K. Goel, Judicial Magistrate, 1st Class, Malerkotla dated 31st August, 1973 acquitting the respondent.*

*Charge under Section 9 of the Opium Act.*

*Order :—Acquittal.*

*D. N. Rampal Dy. A. G. Punjab, for the appellant!*

*Bhupinder Singh Bindra, Advocate, for the Respondent.*

JUDGMENT

*S. P. Goyal, J.*

(1) The primary question involved in this appeal against acquittal is as to whether the evidence of the official witnesses is to be looked at with suspicion simply because no independent witness is taken along with the raiding party.

(2) Amar Singh, Head Constable, accompanied by Excise Inspector Gurbans Singh and the other excise staff proceeded to conduct an excise raid at village Kanganwal on January 9, 1973, at about 10.30 a.m. When they reached the canal bridge near the Kanganwal distributary they noticed the accused (respondent) coming from the opposite side who on seeing the police party tried to slip away. He was, however, stopped by the Head Constable and from a search of his person 80 grams of opium wrapped in a piece of paper was recovered from the front pocket of his shirt. It was converted into two parcels and taken into possession,—*vide* memo Exhibit P. A. One parcel of 10 grams was sent for chemical examination and its contents were found to be opium.

(3) On the basis of the above facts, the respondent was tried for an offence under section 9 of the Opium Act and in support of its case the prosecution relied on the statements of P.W. 1 Gurbans Singh, Excise Inspector, and P.W. 2 Amar Singh, Head Constable. The learned Magistrate without discussing the statements of the said

witnesses and relying on *Dalip Singh vs. The State* (1) acquitted the accused on the ground that no independent witness having been joined in the raiding party the evidence of the official witnesses has to be looked at with suspicion. It is the correctness of the said judgment which has been challenged by the State in this appeal against acquittal.

(4) In *Dalip Singh's* case (supra) 1,750 grams of opium was recovered under similar circumstances from the search of the person of the accused. At the trial the prosecution to prove the recovery relied on the statements of Joginder Singh, Sub-Inspector and Gurbachan Singh, Head Constable. The accused was convicted by the learned Magistrate, but his conviction was set aside in revision by Gujral, J. (as he then was) with following observations:—

“The case against the petitioner only rests on the testimony of Joginder Singh, Sub-Inspector and Gurbachan Singh, Head Constable. No independent witness was joined by Shri Joginder Singh in the raid. The main attack on the evidence of the witness is that in view of their failure to join an independent witness their evidence be looked with suspicion. To me there seems plausibility in this argument which was raised before the Courts below also. It is the case of the prosecution that Joginder Singh Sub-Inspector was heading a party which was going for excise checking and patrolling. In that situation Joginder Singh could have visualised that he may be able to find some contraband articles with some of the persons he would be searching. It was therefore, necessary for him to join independent witness in the party so that the recovery could be established beyond doubt. I am of the view that the failure of Joginder Singh to take an independent witness with him would show the anxiety on his part to make the raid a success and that would attach a taint to his evidence. In these circumstances it is not safe to accept the evidence of Sarvshri Joginder Singh and Gurbachan Singh without independent corroboration, which is lacking in this case.

With greatest respect to the learned Judge we are unable to subscribe to and sustain this view which can be supported neither on any provision in the statute nor on judicial authority.

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(1) 1973 C.L.R. 398.

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(5) Apart from section 103 (now section 100) of the Criminal Procedure Code which requires that an officer making search shall call upon two or more independent and respectable inhabitants of the locality to join and witness the search there is no other provision in the Code which deals with the search by a police officer. But as held in *Radha Kishan v. State of Uttar Pradesh* (2) the search of the person of a man is not governed by the provisions of this section. Consequently, howsoever desirable the presence of the witnesses at the time of such a search it may be, it cannot be ruled that the absence of the independent witnesses would render such proceedings unreliable or open to suspicion.

(6) As for the judicial authorities suffice it would refer to a Division Bench decision of this Court in *State v. Sadhu Singh* (3) wherein the provisions of sub-section (7) of section 10 of the Prevention of Food Adulteration Act were under consideration and it was held that though the provisions of said sub-section were mandatory yet the non-compliance with these provisions by itself was not sufficient to vitiate the proceedings of the taking of sample. The Bench further observed, "the provisions like those contained in sub-section (7) of section 10 of the Prevention of Food Adulteration Act are intended as safeguards not only in the interest of an accused person but also to ensure purity of administration and to guard against victimization of innocent persons. When the law lays down such safeguards, they must be scrupulously observed by the persons concerned. If they are disregarded without adequate reasons, then the conduct of the person whose duty it is to comply with those provisions would certainly arouse suspicion against his *bona fides*, and, accordingly, the evidence relating to the taking of samples would have to be subjected to careful scrutiny so as to exclude the possibility of foul-play or victimization". From the perusal of the observations of the Bench noticed above it is evident that even in a case under the Prevention of Food Adulteration Act, the non-compliance with the provisions of sub-section (7) of section 10, which was held to be mandatory, the non-securing of the attendance of the two persons at the time of taking of the sample by itself was held not sufficient to vitiate the proceedings or the trial. There being no provision of law requiring the attendance of any independent witness at the time of the search of the person of a suspect, the recovery proceedings

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(2) A.I.R. 1963 S.C. 822.

(3) A.I.R. 1962 Pb. 548.

cannot, therefore, be held to be suspicious or unreliable simply because no independent witness was opted to join the raiding party. At best, it would be a suspicious circumstance which would require the Court to scrutinise the prosecution evidence with more caution and care but in no case by itself it can warrant the discredit of the prosecution case. We are, therefore, of the considered view that *Dalip Singh's case* (supra) was not correctly decided and the dictum laid down therein that the failure to join an independent witness on the part of the police official would attach a taint to his evidence, has to be disapproved.

(7) On facts, however, we are not satisfied that it is a fit case to order retrial. Admittedly, the police along with the Excise Inspector had formed a raiding party to make a raid at village Kanganwal on the basis of some secret information. It is surprising that the raiding party remained content with the recovery of this small quantity of opium and, therefore, returned to the police station. No explanation was given as to why the raiding party did not proceed to village Kanganwal to make the intended raid. Moreover, Head Constable Amar Singh did not even state that he got his person searched before searching the person of the respondent.

(8) Keeping in view the common place story and the other circumstances discussed above, we feel that the case against the accused is not free from reasonable doubt and dismiss the appeal accordingly.

S. S. Sandhawalia, J.— I agree.

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K. T. S.

CRIMINAL MISCELLANEOUS

Before S. C. Mital, J.

SURINDER KUMAR ETC.,—Petitioners

.. . . . versus

THE STATE OF PUNJAB,—Respondent.

Criminal Misc. No. 1488-M of 1977

May 18, 1977.

*Criminal Procedure Code (II of 1974)—Sections 170(1), 173(5) and 209—Persons not sent up for trial by the police—Magistrate—Whether can commit them for such purpose.*