tentatively determine the same before it orders any amount to be deposited as security before the sale is stayed. In the instant case, no such approach has been made by the executing Court which has just chosen a sum of Rs. 6,000, out of the decretal amount of Rs. 10,000, to be deposited as security, when there is a specific allegation that the value of the property is Rs. 10,000.

(7) For the foregoing reasons, I allow this appeal, set aside the order of the executing Court and remand the case for a fresh decision as to whether and to what extent the judgment-debtor should be called upon to furnish security before the sale of the attached property is stayed and this should be done after giving full opportunity to the parties to be heard and to lead any evidence, if so advised.

(8) There will be no order as to costs of the present appeal.

R. N. M.

APPELLATE CRIMINAL

Before Gurdev Singh and S. S. Sandhawalia, JJ.

STATE,—*Appellant.*

versus

SHAM SINGH AND OTHERS,—*Respondents.*

Criminal Appeal No. 763 of 1966

April 25, 1969

Opium Act (I of 1878)—Sections 9 and 10—Respective scope of—Presumption under section 10—When can be drawn—Joint incriminating possession—Liability for—Whether within the ambit of Criminal Law—Contraband articles recovered from a small vehicle like a car—Inference of joint possession—Whether can be raised against the occupants of such car.

Held, that on a close reading of the provisions of sections 9 and 10 of the Opium Act, 1878, together it is evident that the initial burden is on the prosecution to show the connection of the accused person with the incriminating opium but once this initial onus has been discharged by the prosecution, the presumption under section 10 is to be called in that the accused person is guilty of an offence under section 9. The onus is then shifted on to the accused person to show that his connection and dealing with the incriminating opium was justifiable or innocent. By the interplay of the presumption under section 10 it becomes no longer incumbent upon the prosecution to prove all the necessary ingredients of the offence under section 9 including the fact that the accused had conscious possession—that is presumed against him—and it is for him to show that there was want of

knowledge on his part about the incriminating opium. A presumption under section 10, however, cannot by itself be used to establish a fact. It can come into play only after certain facts upon which it is to rest have been first proved by the prosecution. This stage of raising the presumption under section 10 arises when the prosecution proves that an accused person has dealt with opium in any of the ways described in section 9. It is then that by virtue of the provisions of section 10, it is to be presumed that in regard to such opium the accused person has committed an offence under the Act and the onus of proving that he had a right to so deal with it or that his dealing therewith was innocent is thrown upon the accused person.

(Paras 26 and 27).

Held, that liability for joint incriminating possession of an article or thing is clearly within the ambit of the Criminal Law. (Para 14)

Held, that considering the surrounding circumstances and other relevant facts in a given case an inference of joint possession, control or dominion may legitimately be raised against the occupants of a small vehicle like a motor car in which contraband is discovered. Such an inference is not a conclusive one. It may be rebutted and as is well-settled the burden of rebuttal upon an accused-person is always a light one. Nevertheless it would cast a burden, however, light, upon such occupants to furnish at least a plausible explanation or in any case to point to facts negativating such an inference.

(Para 17)

Held, (per Gurdev Singh, J.) that under section 9 of the Opium Act, mere possession constitutes an offence, section 10 becomes otiose if it is held that before resort can be had to it the prosecution must prove that the accused was in exclusive or conscious possession of the opium. Section 10 of the Act implies that a person who is in any way concerned with opium that forms the subject matter of prosecution or has otherwise dealt with it in any manner so as to render him accountable for it will be presumed to have committed an offence under section 9 of the Act unless he can "account satisfactorily" for it. (Para 43)

Appeal from the order of Shri Dina Nath, Judicial Magistrate, 1st Class, Bhatinda, dated the 25th April, 1966 acquitting the respondents.

M. R. CHIBBER, ADVOCATE FOR ADVOCATE-GENERAL, PUNJAB, for the Appellant.

B. S. BINDRA, AND MOHINDERJIT SETHI, ADVOCATES, for the Respondents.

JUDGMENT

SANDHAWALIA, J.—This criminal appeal raises yet again the rather vexed question of the concept and nature of "possession" in prosecutions under section 9 of the Indian Opium Act.

(2) The two respondents along with one Sham Singh (who has died during the pendency of this appeal) were brought to trial on charges under section 9 of the Opium Act before the Judicial Magistrate, 1st Class, at Bhatinda, who according the benefit of doubt, acquitted them by his order, dated the 25th of April, 1966. The State of Punjab now challenges this acquittal by way of appeal.

(3) On the 17th of October, 1964, at 4 p.m. Sub-Inspector Gurcharan Singh, who at the relevant time was the Station House Officer Kotwali Bhatinda received secret information whilst he was present in the district Court compound. This information was to the effect that Sham Singh and the two respondents were habitual dealers and smugglers in opium and were presently carrying opium from Ferozepur towards Bhatinda in a car (No. PNB 2422). Sub-Inspector Gurcharan Singh, forthwith sent the information, Exhibit P.G. to the police station on the basis of which formal first information report, Exhibit P.G./1 was recorded. Meanwhile he himself along with the police party moved towards the Canal bridge on the Ferozepur-Bhatinda road situated at about a mile or more from the town. On his way at the Bus-Stand he incidentally came across Pritam Singh P.W. 1 and Hardam Singh P.W. 2, who were joined as public witnesses with the police party. Having reached the canal bridge the police party split up into four separate parties and took up positions on both sides of the bridge at about 4.30 p.m. At about 5 p.m. car No. PNB 2422 approached the bridge from the Ferozepur City and having seen it coming, the Sub-Inspector Gurcharan Singh and others moved a deserted cart lying near the spot to the middle of the road for the purpose of obstructing the passage of the said vehicle. They thus succeeded in stopping the car and found that Sham Singh was driving the same whilst Balwant Singh and Gurdev Singh, respondents were sitting in the rear seat. All three thereafter came out of the car and Sham Singh produced a bunch of keys Exhibit P. 2, which was taken into possession and the luggage boot of the car was opened with the key Ex. P. 3 wherefrom a gunny bag was recovered. This contained one canvas bag Exhibit P. 6 which further contained 9 bags containing different amounts of opium which on weighment was found to be 15 kilograms and 750 grams. Ten grams of opium were taken out from each bag as samples and separately sealed whilst the rest of the opium was also duly sealed and taken into possession. From a search of the car and the personal search of all the three accused-persons certain other articles were also recovered and taken into possession,—*vide* relevant recovery

memos. On subsequent chemical analysis the samples were opined to be opium and on the completion of the investigation the two respondents along with Sham Singh were sent up for trial with the result noticed above.

(4) The prosecution examined P.W. 1, Pritam Singh and P.W. 2 Hardam Singh, the public witnesses regarding the recovery. P.W. 4 Sub-Inspector, Gurcharan Singh is the Investigating Officer, who had organised the raid whilst P.W. 3 Dewan Singh was produced to show the connection between Balwant Singh, respondent and Sham Singh and also for the purpose of identifying the alleged hand-writing of Balwant Singh, respondent on Exhibit P. 16.

(5) In their statements under section 342, Criminal Procedure Code, the two respondents and Sham Singh, took up the plea of false implication. Balwant Singh, respondent, stated that he had come from village Bandi and was present at the Bus Stand from where he was arrested and falsely implicated. Similarly Gurdev Singh, respondent stated that he was the driver of the truck owned by one Shivji Ram of Mansa and on his refusal to oblige Sub-Inspector Gurcharan Singh by carrying some luggage he had been falsely implicated in the case. Sham Singh the co-accused of the two respondents took up the plea of a long standing hostility between him and the local police including Shri C. K. Sahni, the Superintendent of Police, posted at the relevant time at Bhatinda. He relied on various petitions and complaints which he had made to the Chief Minister, the Home Minister and other authorities against the district Police. He stated that on the 17th of October, he had come to Bhatinda to purchase medicines as he was the Medical Practitioner and was arrested on the Bus Stand at 5.30 p.m. and thereafter falsely implicated. Six defence witnesses were examined in support of the pleas taken up by the defence and documents Exhibits D.K. to to D.Z. and D.A./1 to D.Y./1 were tendered to be read in evidence.

(6) At the very outset it may be pointed out that it has been stated at the bar by Mr. Bindra, the learned counsel for the respondents and also by Mr. M. J. Sethi, that Sham Singh is dead and as such under section 431 of the Criminal Procedure Code, the appeal against him abates and it is unnecessary to notice his case in any great detail.

(7) In the very first instance it has been contended with vehemence on behalf of the respondents that even accepting the prosecution case in its entirety no offence under sub-clause (a) or any

other clause of section 9 of the Opium Act is disclosed against them. The learned counsel for the respondents maintained that it was unnecessary to go in to the evidence, if this view was to be sustained. The case was hence argued at great length on this basis both on behalf of the appellants and the respondents. In support of this contention Mr. Bindra highlighted the fact that the prosecution in the present case had established no close connection whatsoever between the two respondents *inter se* or with Sham Singh, their deceased co-accused. Again the two respondents were only found in the rear seat of the car which was being driven by Sham Singh. The incriminating opium was found in the luggage boot of the car which was locked and the key whereof was with Sham Singh only. This car belonged to another person, namely, one Hans Raj of village Bor and that there was no evidence that it had been entrusted to the custody of either of the respondents. Consequently the argument raised was that being a passenger in a car which may be carrying opium in its luggage boot or any other part is without more devoid of any criminality. As a corollary to this it was argued that 'possession' under section 9 of the Opium Act implies 'conscious possession' and that the onus is on the prosecution to show that not only were the respondents in de-facto possession, but further that they were conscious of the same and also that the incriminating article fell within the definition of opium under the Act.

(8) Reliance was placed first on a Single Bench judgment of the Rangoon High Court in *Shwe Kyo and others* v. *Emperor* (1), where five occupants of a Dodge car were stopped and searched. A ball of opium in each pocket of a folded waterproof coat was discovered in front of the rear seat. This rain-coat fitted one Lwang, who was an occupant of the car and he admitted its ownership, but pleaded that he did not know to whom the opium belonged. All five persons were convicted by the trial Court. Lwang did not appeal, but the other four were acquitted on appeal by the High Court. It was observed that the term 'possession' implies knowledge on the part of the alleged possessor and in the absence of circumstances from which it could be conclusively inferred that the four appellants had knowledge of the presence of opium it would not be safe to punish them on mere suspicion. It is significant to note, however, that in this case the person in whose raincoat the incriminating opium was recovered had not appealed and his conviction obviously became final. The finding of the Court further was that it was possible that the

(1) A.I.R. 1929 Rangoon 121.

other four occupants may be unaware of the existence of opium which might have been concealed from their knowledge by the said Lwang. Further no reference was made to section 10 of the Opium Act.

(9) Primary reliance, however, has been placed by the learned counsel for the respondents on the observations of Bedi J. in *Pritam Singh and others* v. *The State* (2), in support of the proposition canvassed by him. In this case five occupants of a truck which contained 19 bags of poppy-husk were apprehended by the police on receipt of secret information regarding the same. Pritam Singh, petitioner, was driving the truck whilst another was sitting with him and of the other three, two were found sitting on the bags stored in the body of the truck whilst the other was sitting in the corner of the same. Acquitting all the five including Pritam Singh, petitioner, who was driving the truck the learned Judge upheld the contention raised on their behalf in the following terms on which heavy reliance has been placed :—

> "The petitioners' counsel submitted that even if the facts given by the prosecution are taken to be correct still none of the petitioners could be held to be guilty as it could not be said that they were in conscious possession of the incriminating article. The proposition put forward by the counsel is correct as possession implies knowledge and there would be no possession when there is no knowledge on the part of the ostensible occupant of the cabin or room or the article as the case may be. Possession without knowledge can hardly have been meant since in that case the element of criminal intention or knowledge would be entirely wanting."

In *Pritam Singh's case* (2), Bedi J., had placed strong reliance on the observation of the Division Bench in *Cyril C. Baker* v. *Emperor*, (3), which has been pointedly referred to on behalf of the respondents. The facts were that the appellant was an Assistant Wireless Operator on a ship and from the search of his cabin, the key of which was produced by him nearly 20 seers packets of opium were found concealed in the covering of the settee and the mattresses of the upper and lower berth therein. The defence plea was that this had been

(2) 1966 P.L.R. 200.

(3) A.I.R. 1930 Cal. 668.

planted without the knowledge of the appellant by a Goanese servant boy who had been employed to wait on him and the said boy had mysteriously disappeared from the ship on the same evening at about the time of the search. The learned Judges of the Division Bench set aside the conviction and sentence of the appellant with almost identical observations as have been made by Bedi J., in *Pritam Singh's case* (2). Section 10 of the Indian Opium Act was referred to though not very closely considered or analysed and their Lordships proceeded upon the footing that possession must be conscious possession.

(10) There is no gainsaying the fact that the above-said two cases do tend to support heavily the contention raised on behalf of the respondents. We will advert in detail to the facts and the law laid therein hereinafter. In fairness to Mr. Bindra it may be mentioned that he referred to three other cases which in our view are in no way helpful for the determination of the point in issue. In *The State* v. *Faqir Chand,* (4), the accused-person was detected whilst bringing 500 gallons of rectified spirit from Meerut to Punjab. The permit for the same was subsequently found to be a forged document and on the ground that there was nothing to show that he knew or had reason to suspect that the permit was a forgery, he was acquitted by the trial Court. This acquittal was upheld by the learned Judges of the Division Bench. *Lachhman Singh Kartar Singh* v. *The State* (5), is a case regarding the recovery of excisable materials in pursuance of the disclosure statements made under section 27 of the Indian Evidence Act. Both these cases are in our opinion in no way relevant. In *Abdul Ali* v. *The State* (6), the case turned on the interpretation of section 28 of the Assam Opium Prohibition Act. The provisions of this section are in no way in *pari materia* with section 10 of the Opium Act.

(11) Before we go to the arguments and the authorities cited on behalf of the appellants it deserves notice that Mr. Bindra on behalf of the respondents has very fairly conceded that a joint unlawful possession or transporting of opium is possible and hence punishable under the Act. It has not been contended at all by the learned counsel that it was incumbent on the prosecution to establish the exclusive

(4) 1956 P.L.R. 296.

(5) A.I.R. 1951 Simla 185.

(6) A.I.R. 1950 Assam 152.

possession of the incriminating opium of each of the respondents. However, we are not basing ourselves on this concession on this point of law. There appears to be a consensus of judicial opinion in the various High Courts that liability for joint incriminating possession of an article or thing is clearly within the ambit of the criminal law. In *Emperor* v. *Kashi Nath and another* (7), a considerable quantity of cocaine was recovered in a small house occupied by two brothers belonging to a joint Hindu family and running a common business. At the time of the search, the two accused-persons were not present in either of the houses. On the finding that the prosecution had proved that the *dalan* and the *kothri* from where the recovery was made was occupied by the two accused persons and neither of the brothers could possibly have carried on a business of cocaine without the knowledge of the other it was held by the Division Bench that both of them were liable for the cocaine packages which were detected in a locked steel box. Of the same import are the observations of a Division Bench of the Bombay High Court in *Appa Rama Mali* v. *Emperor*, (8) where whilst considering a case of joint possession by brothers living in adjacent huts and holding them guilty of the offence it was observed—

> "Possession of an illicit article, to justify a conviction under the Act, need not necessarily be exclusive possession."

(12) In *Kartara and others* v. *Emperor* (9). Coldstream J. placing reliance on earlier Division Bench authority in *Emperor* v. *Diwan Singh* (10), held that there may be a joint criminal possession of an excisable article by several persons. In a Full Bench authority reported as *Emperor* v. *Santa Singh* (11), Harries C.J. whilst construing the nature of possession required under section 19(f) of the Arms Act 1878 and section 5 of the Explosive Substances Act observed as follows:—

> "All I desire to point out is that exclusive possession or control of any particular person is not required under these sections. The possession or control might well be possession or control of two or more persons."

(7) A.I.R. 1930 All. 161.
(8) A.I.R. 1934 Bom. 16.
(9) A.I.R. 1938 Lah. 320.
(10) A.I.R. 1933 Lah. 148.
(11) A.I.R. 1944 Lah. 339.

In an unreported Division Bench judgment of this Court *Dharam Chand* v. *The State* (12), Capoor J., whilst adding a word of caution to the earlier observations of R. P. Khosla J., observed—

> "Each criminal case has to be decided on its own particular facts and it may well be that the articles, possession of which is made an offence by the statute, may be in the actual possession of more than one person—for instance, two persons living in a hut may have in their possession illicit liquor to which each of them has equal access—and in such a case it is needless to say that both will be liable to punishment under section 61(1)(a) of the Punjab Excise Act."

(13) The above view receives support and confirmation from the recent decision of the Supreme Court in *Ashiq Miyan* v. *State of Madhya Pradesh* (13). In that case a fairly large quantity of opium was recovered from the courtyard of a house in the joint occupation of a father, his two sons and a nephew, in a place where their domestic articles were kept and the same was in frequent use by the family. On these facts the High Court held them guilty for being jointly in possession of the opium. Their conviction was challenged before the Supreme Court apart from other grounds on the score that the evidence did not establish that the four persons were in conscious possession of the opium recovered from the house. Repelling the argument, their Lordships of the Supreme Court observed as follows:—

> "The further finding is that the presence of such a large quantity of opium could not have been possible, without each of them, taking the other, into confidence. These findings have been accepted, by the High Court, and we are satisfied that there is no legal error, or infirmity, committed by any of the Courts, in arriving at that conclusion. Therefore, the two contentions, noted above, will have to be rejected."

(14) On a full consideration of the principle and also of the authorities above-said we are firmly of the view that joint liability for possession of an incriminating article or thing is clearly contemplated by the Criminal Law.

(12) Crl. R. No. 1233 of 1964 decided on 21st December, 1965.

(13) A.I.R. 1969 S.C. 4.

(15) Proceeding a step further from the above-said accepted principle, the learned counsel for the appellant—State, seeks support from four authorities for his contentions that the presence of an accused person or persons in a small vehicle like a motor-car in which incriminating materials are discovered may, coupled with other factors raise an adverse inference of joint possession against the occupants of such a vehicle.

(16) Mr. Bakshi the learned counsel for the appellants has first cited a Single Bench judgment of the Madhya Pradesh High Court reported as *Abdul Rehman* v. *State* (14). In that case a motor car proceeding on the Bombay—Agra road was stopped by an Excise Inspector and on being searched it was discovered that some opium was being carried therein. Five occupants travelling in the car were arrested and subsequently convicted under sections 9-A and 9-B of the Opium Act. The appeal against the conviction having failed before the Sessions Judge, it was challenged in revision before the High Court. The learned Judge upholding the conviction held that where opium was recovered on search from a car during transport, all the occupants of the car must be presumed to commit an offence in respect of that opium under the Act, unless they can show that they had a right to transport it in the manner in which they were doing. Reliance was placed particularly on section 10 of the Opium Act in arriving at that finding. Two cases of this Court were also relied upon—the first of these being *Kanshi Ram* v. *The State* (15), a judgment by Bedi J. In this case the petitioner had been found driving the truck in question when he was stopped by the raiding party and 30 gunny-bags containing poppy-heads were recovered from the truck.—A person, who was alleged to be the other driver of the truck jumped from the same on seeing the police party and escaped and subsequently it was found that no entry relating to the goods in question had been made in the log book. The petitioner was also found to be the owner of the truck and had a valid driving licence. From these facts, an adverse inference against the petitioner was sustained and his conviction was upheld by the learned Judge. The other authority of this Court is an unreported judgment of Gurdev Singh J., in *Diwan Chand, etc.* v. *The State* (16). In this case the conviction of four persons was upheld. The police on receiving

(14) A.I.R. 1958 M.P. 285.

(15) 1962 P.L.R. 1062.

(16) Cr. Rc. No. 596 of 1966 decided on 22nd May, 1967.

secret information against two of the petitioners that they were transporting opium in a jeep had organised a raid party and had lain in the way near a bridge. Shortly thereafter a car was seen coming which was being driven by Pishori Lal, petitioner, whilst Diwan Chand and Chaman Lal, petitioners were on the rear side. On enquiry Diwan Chand, disclosed that opium was in the luggage boot of the car and on its search four canvas bags were recovered from a gunny bag lying in the boot and these were found to contain 37 kilos of opium. Within a few minutes thereafter, a jeep was seen coming from the Kot Kapura side, but when signalled to stop by the police an attempt was made to speed it away. However the driver lost control and the jeep dashed against a tree and fell in a ditch. The driver was killed at the spot, but Banarsi Das another petitioner, who was the other occupant of the jeep was found concealing himself in a thicket nearby and subsequently on search three bags of opium weighing 30 kilos of opium were recovered from the jeep. All the four persons were convicted under the Opium Act and their conviction was then challenged in the High Court. Gurdev Singh J., on a detailed consideration of the facts and the law and in particular after considering *Pritam Singh's case* (2) upheld the conviction with the following observations:—

> "Turning to the circumstances of the case in hand, however, I find no escape from the conclusion that all the four petitioners were in unlawful possession of the opium."

Lastly particular reliance is placed on the judgment of the Supreme Court in *Bhagwanbhai Dulabhai Jadhav and another* v. *State of Maharashtra* (17). In that case a wireless message was received by the Officer posted on the watch duty at Kasheli Naka, district Thana in Bombay, that a certain motor-car was approaching carrying contraband goods. This motor car reached the Kasheli Naka at about 2.30 p.m. and 5 persons were the occupants thereof. The vehicle was searched and from the luggage compartment (which was opened with the key found on search from one of the occupants) 43 sealed bottles of foreign liquor and a large number of packets of tobacco were found therefrom. The trial Magistrate had acquitted all the five persons but on an appeal being filed by the State, the High Court reversed the judgment of acquittal and convicted three of the occupants under section 65(a), 66(b), 81 and 83 of the Bombay Prohibition Act. The appeal against the other two was dismissed merely on the

(17) 1963 (2) Cr. L. J. 694.

ground because they could not be served with the notice of the appeal. This judgment of conviction by the High Court was challenged in the Supreme Court. Their Lordships upheld the reversal of the acquittal by the High Court on the primary charge of possession of the incriminating material by the accused-persons whilst it was held that there was no sufficient evidence regarding the conspiracy to commit the crime and also that there was no warrant for convicting the accused person for abetting of the commission of the offence also. It was nevertheless held that the conviction on the charge of possession could be sustained. Their Lordships observed as follows:—

> "The High Court has on a consideration of the evidence of Sub-Inspector, Deshpande, the Panch witness, Pandhu Kamaliya and Head Constable Ghodabrey come to the conclusion that the accused Nos. 1, 2, and 5 were guilty of possessing liquor in contravention of the provisions of the Act, and in our view the High Court was right in so holding."

With these observations the conviction under section 66(b) of the Bombay Prohibition Act 1949, was maintained.

(17) We are impressed by the contentions raised on behalf of the appellant—State and are in broad agreement with the view of the law enunciated in the authorities cited in support thereof. Learned counsel for the respondents has been unable to advance any cogent argument to controvert the same or to distinguish the cases cited in support of the contention on behalf of the appellant. We are plainly of the view that considering the surrounding circumstances and other relevant facts in a given case an inference of joint possesion, control or dominion may legitimately be raised (in fact it was argued on behalf of the appellant that generally it must be so raised) against the occupants of a small vehicle like a motor car in which contraband is discovered. Needless to say that such an inference would not be a conclusive one. It may be rebutted and as is well-settled the burden of rebuttal upon an accused-person is always a light one. Nevertheless it would cast a burden however light, upon such occupants to furnish at least a plausible explanation or in any case to point to facts negativating such an inference. With respect, if the observations of Bedi J. in *Pritam Singh's case* (2), are constructed to mean that no adverse inference whatsoever can be raised against the occupants of a contraband carrying car or truck then

we are unable to subscribe to such a view. Such a proposition is too broadly stated and does not correctly state the law and would plainly run counter to the binding precedent of the Supreme Court in *Bhagwanbhai Dulabhai's case* (17) which was not brought to his Lordship's notice.

(18) The gravamen of the argument of the appellant-State, however, is directed to the interpretation which according to it should be placed on the provisions of section 10 of the Opium Act as it has been contended that both sections 9 and 10 of the said Act should be read together. The primary argument is that section 10 raises a statutory presumption against the accused-person after the prosecution has *prima facie* proved facts on the record that he has in fact dealt with the incriminating opium in any of the ways delineated in section 9. Once the prosecution establishes such facts it is argued that the presumption under section 10 comes into play and shifts the burden upon the accused-person to show that his dealing with the opium was innocent and not incriminating.

(19) In support of this contention our attention has been drawn to two Division Bench authorities of the Calcutta High Court reported as *Chedi Mala and others* v. *The King-Emperor*, (18) and *Ishwar Chandra Singh* v. *Emperor*, (19) and also the observations of a learned Single Judge of the Madhya Pradesh High Court in *Abdul Rahman's case* ,(14), which has already been referred to above. The three authorities cited undoubtedly do support the proposition canvassed by Mr. Bakhshi on behalf of the State. Mr. Bindra has not cited any case to the contrary. However, he raised a rather ingenious argument that it was incumbent upon the prosecution to first prove all the ingredients of the offence under section 9 of the Act against an accused person and it was only thereafter that resort should be had to the presumption under section 10 of the Act. Frankly we are wholly unable to see any force or cogency in the contention advanced by Mr. Bindra.

(20) To appreciate the rival contentions, it is necessary to examine closely the relevant provisions of the statute, namely, sections 9 and 10 of the Opium Act and particularly the language of section

(18) 8 Cal. W.N. 349.

(19) I.L.R. 37 Cal. 581.

10 around which the main controversy revolves. These are in the following terms:—

> 9. *"Penalty for illegal cultivation of poppy, etc.*—Any person who, in contravention of this Act, or of rules made and notified under section 5 or section 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 warehoused opium,
>
> and any person who otherwise contravenes any such rule,
>
> shall, on conviction before a magistrate, be punished for each such offence with imprisonment for a term which may extend to three years with or without fine
>
> and, where a fine is imposed, 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. *Presumption in prosecutions under section* 9.—In prosecutions under section 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 he has committed an offence under this Act."

(21) A plain reading of the above provisions makes it self-evident that sections 9 and 10 of the Act have to be read together and construed harmoniously. Mr. Bindra has very fairly not controverted this position.

(22) The language of section 10, however, leaves much to be desired and the obscure manner in which it is framed is the primary cause for the controversy which arises as to its true scope and meaning. The trenchant criticism directed against the drafting of

section 10 is well-merited in the words of the Division Bench in *Chedi Mala and others* v. *The King Emperor* (18):—

> "The only difficulty about the case seems to us to arise from the manner in which section 10 of the Opium Act is drafted. Taken as it stands the section is difficult of application,... . . . ."

And yet again referring to section 10 Stephen and Carnduff JJ. in *Ishwar Chandra Singh* v. *Emperor*, (19), observed :—

> "Now, penal clauses in Acts must be construed in the same way as others; and it is obvious that in the latter provision some limitation must be placed on the words 'all opium for which the accused is unable to account satisfactorily', as the phrase would in terms include in any case most of the opium in the world. The intention, however, seems to us evident . . . . ."

(23) However, obscure or otherwise, a reasonable construction has to be placed on the provisions of section 10 of the Act. As we are inclined to view the matter, this section enjoins the raising of a mandatory but a rebuttable presumption against the accused person. The object clearly is, at a certain stage, to lighten the burden which rests on the prosecution to prove every ingredient of the offence under section 9 by calling in aid the presumption under section 10. An enactment like section 10 of a character that is exceptional but by no means uncommon. Similar provisions exist in other statutes and to refer to only two of them which are closely analogous are the terms of section 71 of the U.P. Excise Act and section 55 of the Madras Abkari Act, to which we will advert briefly hereafter. The object of such a provision is patent. Whilst generally in criminal cases presumption of innocence casts on the prosecution the burden of proving every ingredient of the offence this rule is not an inflexible one and may be varied by statute which may be direct otherwise. Such a provision section 10 which enjoins the shifting of the burden on to the accused person after the prosecution has made out a *prima facie case*. The provisions of section 71 of the U.P. Excise Act, 1910, which are closely similar and in parts identical with the provisions of section 10, are as follows:—

> "In every prosecution under section 60 it shall be presumed, until the contrary is proved, that the accused person has

committed an offence punishable under that section in respect of—

(a) any intoxicant, or

(b) any still, utensil, implement or apparatus whatsoever for the manufacture of any intoxicant other than *tari*, or

(c) any materials which have undergone any process towards the manufacture of an intoxicant or from which an intoxicant has been manufactured, for the possession of which he is unable to account satisfactorily."

(24) Whilst confronted with a similar situation in construing this provision, a Division Bench of the Allahabad High Court consisting of Sulaiman, C.J., and Niamatullah, J., in *Emperor* v. *Sita Ram*, (20) whilst lamenting the harshness of the provision, was constrained to remark as follows :—

"The conjoint effect of the definition of 'liquor' and, therefore, of 'excisable article' and Sections 60 and 71 of the Act may lead to highly undesirable results from a judicial point of view; but this Court cannot refuse to give effect to plain provisions of law because it disapproves of the policy underlying them. The object of the Legislature in making these drastic provisions was to subordinate the interest of an ordinary citizen to the needs of excise administration."

(25) Similarly in a very short judgment in *Appu Goundan* v. *Emperor*, (21), whilst construing the effect of the presumption under section 64 of the Madras Abkari Act (1 of 1886) the provision of which are in *pari materia* with the provisions of section 71 of the U.P. Act, Horwill J. observed as follow:—

"As the accused was found in possession of wash, the presumption set out in Section 64 operates and the accused is presumed to have committed an offence punishable under section 55 of Act 1 of 1886."

(26) Obviously a presumption of the nature enjoined under section 10 cannot by itself be used to establish a fact. It can come

(20) A.I.R. 1937 All. 735.

(21) A.I.R. 1938 Mad. 784.

into play only after certain facts upon which it is to rest have been first proved by the prosecution. This stage of raising the presumption under section 10, in our opinion, arises when the prosecution proves that an accused person has dealt with opium in any of the ways described in section 9. It is then that by virtue of the provisions of section 10 it is to be presumed that in regard to such opium the accused person has committed an offence under the Act and the onus of proving that he had a right to so deal with it or that his dealing therewith was innocent is thrown upon the accused person.

(27) In the ultimate analysis on a close reading of the provisions of sections 9 and 10 together it is evident that the initial burden is on the prosecution to show the connection of the accused person with the incriminating opium but once this initial onus has been discharged by the prosecution, the presumption under section 10 is to be called in that the accused person is guilty of an offence under section 9. The onus is then shifted on to the accused person to show that his connection and dealing with the incriminating opium was justifiable or innocent. By the interplay of the presumption under section 10 it becomes no longer incumbent upon the prosecution to prove all the necessary ingredients of the offence under section 9 including the fact that the accused had conscious possession that is presumed against him and it is for him to show that there was want of knowledge on his part about the incriminating opium. We are fortified in the view we have taken by observations in the four decisions noticed above.

(28) *In Chedi Mala and others* v. *The King Emperor*, (18), the Division Bench had observed:—

> "It is also plain the possession need not be to the knowledge of the accused otherwise the section would not be necessary. The section is a penal one and must therefore be read plainly, and the plain meaning is that if excessive opium is found in a man's possession he is liable to be punished unless he is able to account for it satisfactorily."

And again———

> "We, therefore, hold that Chedi was in possession of the opium, his knowledge of its existance is, as we have said, immaterial to his guilt. The manner in which he accounted for

the possession of the opium has been considered unsatisfactory, and we see no reason for considering it otherwise."

(29) In construing sections 9 and 10 of the Opium Act, the Division Bench in *Ishwar Chandra Singh* v. *Emperor,* (19), obseved in the following terms:—

"The intention, however, seems to us evident, and the effect of the two sections appears to be simply this, that, when once it is proved that an accused person has dealt with opium in any of the ways described in section 9, the onus of proving that he had a right so to deal with it is thrown on him by section 10."

(30) In *Abdul Rehman and another* v. *The State,* (14), A. H. Khan J. concurring with the ratio of the above said case, laid down as follows :—

"Here on search of the Car, some opium was recovered and in the circumstances a presumption against all the 5 occupants arises unless they can dispel it otherwise. The general principle of law that a man is presumed to be innocent till he is proved guilty, does not hold good in such cases. The Madhya Bharat case referred to above did not consider the provisions of Section 10 of the Opium Act."

And lastly in *Emperor* v. *Sita Ram,* (20), whilst construing the provisions of section 71 of the U. P. Excise Act, Niamatullah J. had observed as follows :—

"The fact that an excisable article is traced to his custody because of human agency or chemical action in the liquid, of which he is unaware, makes no difference. But section 71 throws the burden of proving want of knowledge on him."

We are in respectful agreement with the enunciation of the law in the cases noted above.

(31) We may now advert to the observations of Bedi J. in *Pritam Singh's case supra* (2), following as they do the earlier view in *Cyril C. Baker's case* (3). It is noteworthy that in this Calcutta case, though there is a passing reference to section 10 of the Opium

Act it is patent from the judgment that its true import was never seriously canvassed before the learned Judges composing the Division Bench. Not a single authority appears to have been cited on either side nor has any been considered or discussed. The two earlier Division Bench decisions of the same Court viz. *Chedi Mala and others* (18), and *Ishwar Chandra Singh's cases* (19), which held clearly to the contrary were not even brought to the notice of the Bench. The case turned upon its peculiar facts and the learned Judges tended to accept the plea and the factual explanation of the petitioner that a Goanese boy alone was possibly responsible for placing the opium in his cabin. With great respect to the learned Judges we are unable to concur with their view, that despite the provisions of section 10 of the Act and the raising of the presumption under it—the onus would still be on the prosecution to prove all the necessary ingredients of the offence under section 9 including that of the conscious possession of opium with the accused-person. In our view such a construction would render the provisions of section 10 to be wholly nugatory and tautologous. It is settled that such a construction of the provisions of a statute is to be avoided. Restating this rule of construction Viscount Simon in *Hill* v. *William Hill (Park Lane)* (22), observed —

> "When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out."

(32) In *Pritam Singh's case* (2), we do not find even a remote reference under section 10 of the Act on which largely our present view rests. This aspect of the matter was not canvassed before Bedi, J. at all. The crux of the matter in fact is not whether conscious possession or otherwise is required to be proved in law, but rather that once the presumption under section 10 comes into play then the ingredients necessary to constitute the offence under section 9 are presumed against the accused person. No authorities were cited on behalf of the respondent—State at all and in their absence the learned Judge subscribed to the view enunciated in *Cyril C. Baker's case* (3), from which we have differed for the

(22) 1949 A.C. 530.

reasons given above. With respect we are of the view that the observations of Bedi, J., do not state the law correctly.

(33) In the view that we have taken, therefore, the primary argument of the respondents that even accepting all the surrounding circumstances, of the prosecution case in its entirety (including the information against them, the mode and manner of the recovery of opium in the car in which they were travelling etc.) no offence whatsoever is disclosed against them, is patently devoid of merit and is hence rejected. It is significant that the plea of the two respondents and their co-accused was one of plain denial. There was no attempt, at explanation or any plea of want of knowledge about the presence of opium in the car.

(34) It thus becomes necessary to revert to the prosecution evidence in the case. We have been very closely taken through the evidence of the prosecution witnesses, the plea of the two respondents and their co-accused Sham Singh and also the voluminous defence evidence brought in support of their plea. The findings of the trial Court have also been closely examined by us. Whilst the learned counsel for the appellant has meticulously assailed all the reasons given by the trial Court for acquitting the respondents, we consider it unnecessary to recount them in detail because in our opinion this appeal must fail on the cardinal point of the reliability and the credibility of the public witnesses of the recovery, namely, P.W. 1 Pritam Singh, P.W. 2 Hardam Singh and also P.W. 3 Diwan Singh. The evidence of Diwan Singh, P.W. 3 is also, in our view, unsatisfactory. In passing, however, we do wish to mention that it is not possible for us to uphold all the reasons which have been accepted by the trial Court in arriving at the finding of acquittal.

(35) The salient infirmities in the evidence of Pritam Singh, P.W. 1 and Hardam Singh P.W. 2 are that both these witnesses did not belong to Bhatinda which is the place of the recovery. Pritam Singh P.W. belongs to village Balluana which is as much as 10 miles from there whilst P.W. 2 Hardam Singh belongs to village Chuge Kalan which is also equi-distant from Bhatinda. The reasons which both these persons give for their having come to Bhatinda and being together at the Bus Stand on the relevant day appear to us to be tenuous. Their evidence in numerous details has been rightly pointed out to be discrepant. Both these witnesses projected themselves to

be wholly independent who had hardly joined in one or two raids earlier. On this point they were falsified by the production of the documentary evidence on behalf of the defence. Exhibits D.Z., D.A./1, D.B./1, D.C./1, D.E/1, D.F/1, D.G/1, D.H./1, D.J./1, D.K./1, D.L/1, and D.M/1, which are copies of the list of prosecution witnesses in opium and excise cases in the Court at Bhatinda show that both these witnesses have figured in numerous cases previously as prosecution witnesses along with either Gurcharan Singh P.W. the present Station House Officer or some other police officials of Police Station, Bhatinda. Apart from utterly weakening the credibility of these witnesses, this fact renders the prosecution version that the Investigating Officer innocently and accidently came across both these stock witnesses at the Bus Stand on the relevant date by chance to be very improbable. In this context it, therefore, appears more than peculiar that though the information was given to the Investigating Officer in the Court compound he chose to join no one from there in the raid party and even at the Bus Stand where numerous other persons and residents of Bhatinda were present, he chose these two stock witnesses of the police to accompany him for the raid. Though Diwan Singh P.W. is not a witness of the recovery, Exhibits D.K. to D.Z. produced by the defence show him as one of the most convenient witness available to the prosecution in innumerable cases. His joining in by the prosecution in the case against the respondents lends added weight to the inference that the Investigating Officer had chosen to join by design wholly convenient witnesses to support the prosecution case when independent corroboration could easily be secured. By joining such witnesses, the Investigating Officer weakened very considerably the force of his own testimony as well. The plea and the defence evidence leaves no manner of doubt that the Investigating Agency was to say the least hostile to Sham Singh, the co-accused of the respondents, and also none too well disposed towards the present two respondents. In this state of the prosecution evidence we find no reason whatsoever to differ from the findings of the trial Court that the testimony of these witnesses was interested & untrustworthy whilst their presence at the Bus Stand is unnatural and doubtful and further that in numerous details their evidence is inconsistent and discrepant.

Whilst deeming it unnecessary to refer to other infirmities of the prosecution case we find no sufficient or compelling reason to set aside the acquittal of the two respondents. This appeal, therefore, must fail and is dismissed.

(36) Gurdev Singh, J.—I agree with my learned brother that this appeal must fail on merits. On the legal question relating to the concept of possession in such cases the relevant provisions and authorities have been elaborately discussed by him. It is unnecessary to traverse the same ground but I would like to add a few words.

(37) This case relates to an offence under section 9 of the Opium Act. Unlawful possession or transport of opium constitutes an offence and similarly possession of illicit arms and exciseable articles is punishable under different laws including the Punjab Excise Act and Arms Act. It appears to be settled that possession contemplated is conscious possession but I do not find any warrant for the contention that such possession must also be exclusive. Dealing with an offence under section 19(f) of the Arms Act, 1878, Harries, C.J., delivering the judgment of the Full Bench in *Emperor* v. *Santa Singh*, (11), observed thus :—

> "All I desire to point out is that exclusive possession or control of any particular person is not required under these sections. The possession or control might well be possession or control of two or more persons."

Earlier in *Appa Rama, Mali* v. *Emperor*, (8), a Division Bench of the Bombay High Court held that—

> "possession of an illicit article, to justify a conviction under the Act, need not necessarily be exclusive possession."

(38) Cases may arise where an illicit article is not found to be in exclusive possession of an individual but in possession of several persons jointly. Once such joint possession of illicit article is proved, the case would clearly fall under section 9 of the Opium Act and all those persons would be liable to punishment for the same. This view finds support from the observations made in the recent decision of their Lordships of the Supreme Court in *Ashiq Miyan and others* v. *State of Madhya Pradesh*, (13), where the finding that large quantity of opium found in the courtyard of the house occupied by several persons was upheld, with the observation :

> "The presence of such a large quantity of opium could not have been possible, without each of them, taking the other, into confidence."

(39) I have thus no hesitation in agreeing with my learned brother that joint liability for possession of illicit opium is clearly contemplated under section 9 of the Opium Act.

(40) This rule was recognised by S. B. Capoor, J. in *Dharam Chand* v. *The State,* (12), wherein the learned Judge said:

> "Each criminal case has to be decided on its own, particular facts and it may well be that the articles, possession of which is made an offence by the statute, may be in the actual possession of more than one person for instance, two persons living in a hut may have in their possession illicit liquor to which each of them has equal access and in such a case it is needless to say that both will be liable to punishment under section 61(1)(a) of the Punjab Excise Act. * * * *"

(41) Where an article is found at a place which is in occupation of more than one person, or several persons are found in a vehicle in which it is being transported, the question at once arises whether it is in possession of all of them jointly or that of one or more of them. This question has to be answered on the facts of each case. Apart from the direct evidence that may be forthcoming, the conduct of the accused and the pleas put forward by them have to be taken into account. I had occasion to refer to this matter in *Diwan Chand and others* v. *The State* (16) and pointed out that the circumstances in which several persons are found travelling in a vehicle in which the illicit article is found coupled with the falsity of their explanation for travelling in that vehicle, may support the prosecution allegation that all of them were in possession of illicit article and were concerned in transporting it.

(42) The cases relating to an offence under section 9 of the opium Act stand on a somewhat different footing from those under the Punjab Excise Act and the Arms Act, as in section 10 of the Act, the legislature has incorporated a statutory presumption, (though rebuttable), which to some extent lightens the burden of the prosecution. This section provides:—

> "In prosecutions under section 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 he has committed an offence under this Act."

(43) As pointed out by my learned brother Sandhawalia, J., this section is not happily worded and on that account some difficulty is being experienced in applying the same. The language of this section as it stands, however, does not warrant the argument raised on behalf of the respondent that before the presumption contained in section 10 of the Opium Act can be availed of, the prosecution must establish the actual or exclusive possession of the accused. Since under section 9 of the Opium Act, mere possession constitutes an offence, section 10 becomes otiose if it is held that before resort can be had to it the prosecution must prove that the accused was in exclusive or conscious possession of the opium. 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 matter of prosecution or has otherwise dealt with it in any manner so as to render him accountable for it will be presumed to have committed an offence under section 9 of the opium Act unless he can "account satisfactorily" for it. The liability to account will arise only when the accused is in some manner found to be concerned with the opium or has dealt with it.

R.N.M.

REVISIONAL CRIMINAL

Before Jindra Lal, J.

DATA RAM,—*Petitioner*

versus

VED PARKASH CHOPRA,—*Respondent.*

Criminal Revision No. 75-R of 1968

May 1, 1969

Criminal Procedure Code (V of 1898)—Section 197—Penal Code (XLV of 1860)—Section 19—Punjab Co-operative Societies Act (XXV of 1961)—Section 84—Election to a Managing Committee of a co-operative society—Returning Officer appointed for scrutinising nomination papers of the candidate to such election—Such officer—Whether a 'Judge'—Sanction for his prosecution—Whether necessary—Offence committed by a magistrate in the discharge of his official duties—Such magistrate ceasing to be so at the time of taking cognizance of the offence—Court—Whether can take cognizance of the offence without sanction.

Held, that a Returning Officer appointed by the Registrar of co-operative societies for scrutinising the nomination papers in connection with the election of the Managing Committee of a co-operative society, to be held under the Punjab Co-operative Societies Act, 1961, is not a 'Judge' as defined