Keki Bejonji and Another

Vs

The State of Bombay

Criminal Appeal No. 124 of 1959

(Syed Jafar Imam, K. Subha Rao, Raghuvar Dayal JJ)

18.11.1960

JUDGMENT

IMAM, J. -

The appellants were convicted under ss. 65(b), 65(f) and 66(b) of the Bombay Prohibition Act of 1949, hereinafter referred to as the Act, by the Presidency Magistrate XX Court, Mazagaon, Bombay. The appellant No. 1 was sentenced to 9 months' rigorous imprisonment and a fine of Rs. 1,000 under section 65(b). No separate sentence was imposed under the other sections. Appellant No. 2 was sentenced to 6 months' rigorous imprisonment and fine of Rs. 500 under section 65(b). No separate sentence was imposed under the other sections. They appealed to the Bombay High Court against their convictions and sentence. The High Court set aside their convictions under ss. 65(b) and 66(b) of the Act but maintained their conviction under section 65(f) read with section 81 relying on the presumption against the appellants arising out of section 103 of the Act. The High Court accordingly directed that the sentence of imprisonment and fine imposed upon the appellants by the Presidency Magistrate under section 65(b) be regarded as the sentence of imprisonment and fine imposed on the appellants under section 65(f) read with section 81.

According to the case of the prosecution, there was a search on August 2, 1958, of certain premises in the occupation of appellant No. 1 on the third floor of Dhun Mansion, Khetwadi 12th Lane. A complete working still was found there and both the appellants were working it. Appellant No. 2 was pumping air into the cylinder with a motor pump while appellant No. 1 was holding a rubber tube attached to the tank. An iron stand with a boiler on it was also found there. Below the boiler there was a stove which was burning. There was also a big jar near the still. According to the prosecution, this big jar contained illicit liquor. Another glass jar was used as a receiver which, according to the prosecution, also contained 20 drams of illicit liquor. The, boiler contained four gallons of wash. There were also 11 wooden barrels containing wash. In the drawing room of the premises a small glass jar containing 20 drams of illicit liquor, a bottle of 1 1/2 drams of illicit liquor and a pint bottle containing 3 drams of illicit liquor were also found. A panchnama was drawn up concerning the recovery of these articles. It was the case of the prosecution that the appellants were manufacturing illicit liquor and were in possession of a still and other materials for the purpose of manufacturing intoxicant and were also in possession of illicit liquor.

The Presidency Magistrate was satisfied that a working still and illicit liquor in the glass jars and the two bottles were found in the premises in question. The High Court also was of the opinion that a working still was found there but it thought that it would not be safe to rely upon the conflicting and unsatisfactory evidence in the case to hold that illicit liquor had been found in the premises in question, as it had not been satisfactorily proved that the bottles and the glass jars had been sealed in

the presence of the panchas. The High Court was further of the opinion that there was no evidence on the record to show that the very bottles which were attached and the sample bottles in which was contained the wash were the bottles which were examined by the Chemical Examiner in respect of which he made a report to the Magistrate. Accordingly, it was of the opinion that the convictions under ss. 65(b) and 66(b) could not stand.

On behalf of the appellants it was urged that no presumption under section 103 of the Act could arise as it had not been established, on the findings of the High Court, that the still was an apparatus for the manufacture of any intoxicant as in ordinarily used in the manufacture of any intoxicant. It was further argued that no questions were put to the accused, when they were examined under section 342 of the Code of Criminal Procedure, in this connection and therefore they had been denied the opportunity to rebut the presumption. The Presidency Magistrate had not used the provisions of section 103 against the appellants because he had found that in fact illicit liquor had been recovered from the premises and that the still was for manufacturing such intoxicant. If the Presidency Magistrate had at all intended to use the presumption under section 103 against the appellants, he was bound to have given them an opportunity to rebut it. If at the appellate stage the High Court was of the opinion that it had not been established that any illicit liquor that it had been recovered as a result of the search, then it ought not to have convicted the appellants on the presumption arising under section 103 without giving the appellants an opportunity rebut the same. In this case the offence under section 65(f) would be the using, keeping or having in possession a still or apparatus for the purpose of manufacturing any intoxicant other than toddy. It was not established by the evidence that the still or apparatus recovered from the premises occupied by appellant No. 1 was one which is not ordinarily used for the manufacture of toddy.

It was further urged on behalf of appellant No. 2 that he could not be convicted either for being in possession of the still or under section 65(f) read with section 81, that is to say, abetment of an offence under section 65(f) of the Act. This appellant was merely a servant of appellant No. 1. If any one was in possession of the still it was appellant No. 1. There was also no evidence to show that appellant No. 2 had abetted appellant No. 1 in coming into possession of the still. Appellant No. 2 was merely using the pump, presumably under the orders of his master, and as he could not be said to be in possession of the still, no presumption against this appellant could arise under section 103 of the Act.

We would deal with the case of appellant No. 2 first. There is no evidence that he in any way aided his master to come into possession of the still. It would be reasonable to suppose that when he was using the pump he was doing so on the orders of his master and he may not have been aware of what was being many featured, whatever suspicion may arise from his conduct. It cannot also be said that he was in possession of the still. The still was in the possession of his master. He was merely an employee in the premises and cannot be said to be in physical possession of things belonging to his master unless they were left in his custody. It seems to us that whatever suspicion there may be against the appellant No. 2 it cannot be said that it had been established beyond reasonable doubt that he was in such possession of the still as would amount to an offence under section 65(f) of the Act. In the circumstances, no presumption could arise under section 103 against him that he was in possession of the still for which he could not account satisfactorily. We would accordingly allow the appeal of appellant No. 2 and set aside his conviction and sentence.

So far as the appellant No. 1 is concerned, there can be no question that he was found in possession of a still which, having regard to the nature of the still as disclosed by the evidence, is ordinarily used for the manufacture of an intoxicant such as liquor. Having regard to the description of the

still, as found on the record, we are satisfied that the still in question is not ordinarily used for the manufacture of toddy. Indeed, it is doubtful that any still is required for the manufacture of toddy is because toddy is either fermented or not. If the toddy is unfermented the need for a still is unnecessary. On the other hand, if the toddy is fermented, the process of fermentation is a natural one and does not require the aid of any apparatus to ferment it. It was said, however, that by heating the toddy, a higher degree of fermentation takes place and it becomes more potent. We have, however, no evidence on the record as to this. Even if we assume that toddy, when heated, becomes highly fermented and therefore more potent, there is nothing to show that the heating process to achieve this required an elaborate still of the kind found in the premises of appellant No. 1.

It was, however, pointed out that no questions were put to the appellant in order to give him an opportunity to rebut the presumption arising out of section 103 of the Act. It is, however, to be remembered that when the appellant was examined under section 342 of the Code of Criminal Procedure he had volunteered the statement that he did not know about the various contrabands seized by the police. Since this was his attitude in the matter, it is difficult to understand what further questions could have been put to him to explain the possession of the still and the various other articles found in the premises occupied by him. It is not possible to say in this particular case that this appellant had been prejudiced by the failure of the Magistrate to put to him any specific questions about the still and the other articles found in the premises occupied by him.

The presumption which arises under section 103 of the Act is that an offence under the Act is committed where a person is found in mere possession, without further evidence, of any still, utensil, implement or apparatus whatsoever for the manufacture of any intoxicant as are ordinarily used in the manufacture of such intoxicant until the contrary is proved. It is difficult to conceive that the appellant could have given any satisfactory evidence to establish that the still and other articles found in the premises occupied by him could ordinarily be used for the manufacture of toddy. We are accordingly satisfied that there was no prejudice caused to the appellant, in the circumstances of the present case, when the High Court relied upon the presumption arising under section 103 to uphold his conviction under section 65(f) of the Act.

It was finally urged that the sentence should be reduced. In our opinion, the sentence imposed cannot be said to be unduly severe having regard to the provisions of the Act.

Accordingly, the appeal of appellant No. 2 is allowed and his conviction and sentence are set aside but the appeal of appellant No. 1 is dismissed.

Appeal disposed of accordingly.

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