Ram Krishna Bedu Rane

Vs

State of Maharashtra

Criminal Appeal No. 254 of 1969

(J. S. Shelat, I. D. Dua, Y. V. Chandrachuda JJ)

01.11.1972

JUDGMENT

SHELAT, J. -

1. On December 18, 1967 at about 6.45 p.m. P.W. 3 Dukhuprasad Tiwari, a taxi driver, brought in his taxi the appellant, then a police Head Constable, to the Vithalbhai Patel Road, Police Station, Bombay, together with another person. The appellant was at that time in the police uniform. He was laying unconscious in the taxi, his breath smelt of alcohol and he was unable to take care of himself. His companion too was in a similar condition. Police Inspector More thereupon sent the appellant to the J.J. Hospital, where the appellant was examined by Dr. Kandurkar. The medical certificate issued by the doctor showed that the appellant was still under the influence of alcohol, that his pupils were dilated and though his speech was coherent, he was still under the effects of alcohol. The chemical analyser's report of his blood, taken as a sample, showed that it contained alcohol to the extent of 0.230 m.g. On these facts, the appellant was put up for trial before the Presidency Magistrate, 4th Court under Sections 66(1)(b) and 85 of the Bombay Prohibition Act 25 of 1949.

2. Section 66(1)(b) of the Act provides that whoever, in contravention of the provisions of the Act or any rule or regulation or order made or of any licence, permit, pass or authorization issued thereunder, consumes, uses, possesses or transports any intoxicant shall on conviction be punished with imprisonment for a term extending to six months and with fine extending to Rs. 1,000. Section 85(1)(3) provides that whoever in any street or thoroughfare or public place or in any place to which the public have or are permitted to have access is drunk and incapable of taking care of himself shall on conviction be punished with imprisonment and fine as provided therein.

3. The appellant's defence was that he was not under the influence of any prohibited alcohol, that he had taken Javerian Jivan mixture as he had stomach pain and had become unconscious as a result of an overdose of that mixture. The Trial Magistrate accepted that defence and ordered his acquittal. In the appeal filed by the State in the High Court, the High Court reversed the order of acquittal and convicted the appellant under both the counts and sentenced him under the first count to three months' imprisonment and a fine of Rs. 500/- and to seven days' imprisonment and a fine of Rs. 35/- under the second count, but directed the substantive sentences to run concurrently. This appeal by special leave is against the judgment and order of sentence passed by the High Court.

4. There is no doubt that the evidence of the taxi-driver, witness, Tiwari, was the most material piece of evidence. In his examination-in-chief he stated that the appellant and one other person with him engaged his taxi at about 6 p.m. and directed him to drive them to Kandewadi. On the way both of them got down from the taxi and went in a shop. They returned from the shop to the taxi and

directed him to drive them to the Central Cinema. As both of them became unconscious in the taxi, he drove the taxi to the Vithalbhai Patel Road Police, Station and handed them over to the police there. The appellant at that time, according to him, was not in a position to take care of himself. In his cross-examination, however, the witness added that while the appellant was in the taxi, he heard him complaining to his companion of pain in his stomach and saw him drinking something. What it was, he, of course, could not say. He then found the appellant unconscious. The suggestion obviously was that it was what the appellant drank in the taxi itself which rendered him unconscious. As a follow-up of this suggestion made for the first time in the cross-examination of the taxi driver, the appellant in his Section 342, statement said that he had taken Javerian Jivan mixture on account of his having stomach pain. But contrary to the evidence of the taxi-driver, he said that he had taken the mixture at Kandewadi and not in the tax and that he became unconscious because he had taken an overdose of that mixture.

5. Two difficulties at once arise before the case of the appellant having taken Javerian Jivan mixture can be accepted. If the appellant had taken that mixture in the taxi as the taxi driver deposed, the bottle of that mixture would be in the taxi and that would have been taken charge of by the police when Tiwari brought the appellant and his companion to the Police Station and surrendered them to the police in an unconscious state. Obviously, therefore, the statement of Tiwari that he heard the appellant complaining of stomach pain and drinking something in the taxi with a view to cure it cannot be a trustworthy piece of evidence. If the appellant had taken the mixture while he was in the taxi as suggested by the taxi-driver and had as a result become unconscious he could not have kept the bottle with him so as to enable him to produce it in the Trial Court as he in fact did. This shows that the taxi driver's statement that he saw him taken that mixture in the taxi and the appellant's production of the bottle were obviously afterthoughts to bolster up a defence. Besides, the appellant's own case was that he drank the mixture not in the taxi but in a shop at Kandewadi. The second difficulty is that whether he took the mixture in Kandewadi or in the taxi, that assertion could not explain how the appellant's companion also had become unconscious in the taxi and remained so till Tiwari drove his taxi to the Police Station and surrendered them to the police. It is impossible to think that both of them had simultaneously stomach pain to relieve which both took an overdose of that mixture.

6. It is true that Dr. Kandurkar, in his cross-examination conceded that Javerian Jivan mixture was a medicine for stomach pain, that it contained 53 per cent. alcohol, that it was available in the market without a prescription by a Doctor, and that if the whole of it was drunk, it would produce more than 23 per cent. concentration of alcohol in the blood. An overdose of it would also render a man unconscious. Those answers were given in response to hypothetical questions as to the effect of the Javerian Jivan mixture. No question was, however asked to the Doctor as to whether the appellant had become unconscious or that a certain concentration of alcohol in the appellant's blood was due to the appellant's having actually taken the said mixture. As stated before, such a possibility would mean that as an extraordinary exigency both the appellant and his companion had at the same time stomach pain to relieve which both of them had recourse to overdose of that mixture. Besides the statement of Tiwari and the appellant's statement, both of which were clearly unacceptable for reasons already stated above, there was no other evidence that : (a) the appellant had purchased a bottle of Javerian Jivan mixture, and (b) that he and his companion had drunk it.

7. Section 66(2) provides that where in any trial an offence under clause (b) of its sub-section (1) for the consumption of an intoxicant, it is alleged that the accused person consumed liquor, and it is proved that concentration of alcohol in the blood of that person is not less than 0.05 per cent. weight in volume, then the burden of proving that the liquor consumed was either a medicine or a toilet

preparation, etc. containing liquor, the consumption of which is not in contravention of the Act or the Rules or regulations made thereunder shall be upon such accused person. Sub-section (2) is subject to the provisions of sub-section (3), but we are in this case not concerned with those provisions, and therefore, they need not be set out. A similar presumption is also provided in sub-section (2) of Section 85 in a prosecution of an offence under its sub-section (1). It is thus clear, as found from the medical examination of the appellant, that the concentration of alcohol in his blood was more than 0.05 per cent., and therefore, the burden of proving that he had taken an overdose of Javerian Jivan mixture which accounted for that concentration was under both the sections upon the appellant.

8. In State of Maharashtra v. Laxman Jairam ((1962 Supp 3 SCR 230 : AIR 1962 SC 1204), this Court held that a statement under Section 342 of the Code of Criminal Procedure can be taken into consideration in considering the guilt or innocence of an accused person and if such a statement is acceptable, it would be sufficient to discharge the burden of proof thrown upon him by Section 66(2) and Section 35(2) of the Act. As to the quality and quantum of material necessary for the rebuttal of such a statutory presumption, this Court in Dhanvantrai Desai v. State of Maharashtra ((1963 Supp 1 SCR 485, 496-497 : AIR 1964 SC 575), a case of a statutory presumption under Section 4 of the Prevention of Corruption Act, 1947, drew a distinction between the presumption under Section 114 of the Evidence Act and a statutory presumption mandatory upon the Court repelling the contention that under a statutory presumption the only thing necessary is an explanation or evidence which need be only reasonably true and not necessarily true and thereby throwing a doubt on the prosecution case, this Court observed at page 497 as follows :

> "The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must, further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted."

9. The question then is whether the appellant had discharged the burden thrown upon him by Sections 66(2) and 85(2) by means of the evidence of the taxi-driver and his own statement under Section 342 of the Code of Criminal Procedure. As earlier stated, the two statements, contradicted each other. Each of them was negatived by the fact that the appellant's companion in the taxi was also found unconscious and unable to take care of himself when the taxi driver brought him and the appellant to the Police Station. The production of the bottle by the appellant also was a clear pointer rendering the defence untenable. If the appellant was suffering from stomach pain and had in order to cure it taken an overdose of the Javerian Jivan mixture it would be he alone who would have become unconscious and not his companion also. If the mixture was taken in the shop in Kandewadi its bottle would not be with the appellant, and could not have been produced by him at the trial. If the appellant had taken the mixture in that shop, it would have been quite easy for him to examine the person who sold him that bottle. Assuming that he carried that bottle with him in the taxi either after drinking the mixture at the shop or he drank the mixture in the taxi as averred by the taxi-driver, that bottle would have been found in the taxi or in his possession and would have been seized

by the police. In either event, since the appellant was lying unconscious in the taxi, the taxi-driver, when he brought the appellant and his companion to the Police Station, would have pointed out to the police officer that the two passengers had taken something in the taxi and that the bottle containing it was either in the taxi or in possession of the appellant. Nothing of that kind was done. It is clear that the production of a bottle of that mixture during the trial was an afterthought spun out with a view to bolster up a defence.

10. In our view the appellant failed to rebut the presumption which the Court is obliged to draw under the Act. The High Court, therefore, was justified in reversing the Magistrate's order of acquittal and convicting the appellant.

11. The appeal fails and dismissed.

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