Sri Chand Batra

Vs

State of U. P.

Criminal Appeal No. 138 of 1970

(M. H. Beg, Y. V. Chandrachud JJ)

19.12.1973

JUDGMENT

BEG, J. -

1. This appeal comes up before us by a certificate of fitness of the case for appeal to this Court granted by the Allahabad High Court under Article 134(1)(c) of the Constitution.

2. The appellant was convicted under Section 60(a) of the U.P. Excise Act and sentenced to six months rigorous imprisonment and a fine of Rs. 1,000 and, in default of payment of the fine, to undergo imprisonment for a further period of two months. His conviction and sentence were confirmed by the Sessions Judge as well as by the High Court of Allahabad.

3. On October 27, 1967, at about 6.45 p.m., he was found by the raiding Excise Staff in a room of a bungalow in Meerut apparently preparing something with the aid of materials found there which were seized. These were said to be :

> "1. Five drums, each containing about 20 litres liquor of O.P. strength, the sample whereof was taken in five bottles from each tin.
>
> 2. Three empty drums of five gallons capacity.
>
> 3. Thirty empty bottles bearing labels.
>
> 4. Labels, 120 in number, bearing the words 'Khody's Hercules .....'.
>
> 5. Different types of capsules, 142 in number."

His plea was that he had no concern with the bungalow in question and that he was not present at the time when its search was taken. He said that the Excise Inspector came to the liquor shop of Gyan Chander Mohan, situated in Sadar Bazar, Meerut, where he was working as a Salesman. According to him, the Excise Inspector wanted to check the stock of spirit and demanded the register form him. As the register was locked in a drawer the Excise Inspector is alleged to have abused the appellant and implicated him falsely for alleged possession of the objects mentioned above.

4. It may be mentioned here that the search of bungalow No. 243, Circular Road, Meerut Cantonment, from where the recovery was made, was taken after the issue of a regular search warrant (Ex. Ka. 1) under Section 52 U.P. Excise Act, 1910, by a First Class Magistrate on October

26, 1967. The very detailed recovery from (Exhibit Ka-2) dated October 27, 1967 was signed by as many as six witnesses, in addition to having been signed by the officer who conducted the search and by the appellant himself. In this Memo., in the column for remarks, the result of the test report of the liquor is given as follows :

> "Test report of the liquor. - The contents of all the five (paper torn) of dirty white colour like (paper torn) characteristic smell of the (paper torn) Hydrometre test is as under (Paper torn).
>
> #Drum No. 1 - 77 F x 13.2 - 50. 9 O.P.Drum No. 2 - 77 F x 13.4 - 50. 7 O.P.Drum No. 3 - 76 F x 13.8 - 50. 6 O.P.Drum No. 4 - 76 F x 13.2 - 50. 2 O.P.Drum No. 5 - 77 F x 13.6 - 50. 5 O.P.##
>
> Hence the contents of each drum are liquor of O.P. strength."

5. Two questions have been raised in this case for our consideration : Firstly, whether the smelling test employed by the Excise Inspector together with other circumstances were enough to justify the conclusion that the liquid recovered was illicit liquor of "O.P" strength ? And, secondly, whether the Excise Inspector could be considered an expert whose opinion about the nature of the liquid found was opinion evidence admissible under Section 45 of the Evidence Act ?

6. It will be seen form the statement of the appellant under Section 342, Criminal Procedure Code that he had professed ignorance about the nature of the liquid recovered form the room of the house in which he was found. The false defence taken, that he was not present at the house in question when it was searched, could indicate that he wanted to keep his distance from the recoveries made as he was aware of their incriminating nature. Moreover, the appellant, who was an employee in a liquor shop, could not be so ignorant about the nature of the liquid recovered as not to be able to raise the question before the trial Court that the liquid under consideration was not "liquor"as defined by the Act. In the trial Court, he examined a number of witnesses to substantiate his plea that he was not present at the house from which the recovery was made but was taken form the shop in Sadar Bazar. And, that was the only question of fact which seems to have been raised and considered in the trial Court at considerable length. Before the Sessions Judge also the main question raised was whether the appellant was arrested from the shop in Sadar Bazar or from the Kothi at Circular Road, Meerut Cantt. The learned counsel for the appellant had, however, at the end of his arguments also contended, before the Sessions Judge, that the liquid recovered had not been proved to be illicit liquor even if it was established that the recovery was form the possession of the appellant. He had relied on state of Andhra Pradesh v. Madiga Boosenna and Others. ((1967 3 SCR 871 : 1967 Cri LJ 1398 : AIR 1967 SC 1550)

7. The learned Sessions Judge had distinguished Boosenna's case (supra) on the ground that the Excise Inspector in the case before us, who had the required technical knowledge and training behind him, and attested the contents of the drums with the aid of litmus paper, hydrometer, and thermometer and not confined himself to swelling the contents of the drums. The question of the admissibility of the opinion of the Excise Inspector was, however, not raised before the Sessions Judge.

8. It appears that both the questions formulated above were raised before the High Court when the appellant's revision application came up before it. The High Court had also distinguished Boosenna's case (supra) on the ground that there were sufficient number of surrounding

circumstances to buttress the opinion evidence of the excise Inspector in the case before us. It pointed out that this was not so in Boosenna's (supra). The High Court has also held that it appeared, form the Excise Manuals and various rules framed by the U.P. Government which had been placed before it, that the Excise Inspectors have to undergo rigorous training in all branches of knowledge involved in the performance of their duties including knowledge of the process of distillation and that the Excise Inspector of C. D. Misra, P.W. I, was a senior man incharge of raids and detention of important cased so that his opinion evidence was admissible, presumably as "expert" evidence, and could be relied upon. In certifying the case under Article 134(1)(c) of the Constitution the High Court had observed that it was desirable that this Court may decide the question whether, despite the corroborating facts and circumstances which supported the smelling test employed by the Excise Inspector in the case before us, the rest to which liquor was to be subjected in such cases was not to be more scientific and accurate than the one actually employed by the Excise Inspector.

9. Learned Counsel for the appellant had cited State v. Madhukar Gopinath Lalge, (ILR 1965 Bom 257 : Cri LJ 167 : AIR 1967 Bom 61) where it was held in a prosecution under Bombay Prohibition Act, that, although the circumstances in which an accused was discovered carrying liquid in rubber tubes may raise grave suspicion against him, yet, the Court would not be content with anything less than a chemical or ido-form test to determine the composition of the liquid. It was held that the Sykes' or the Hydrometer test could not help in determining whether the liquid under consideration there really contained alcohol or not. It, however, also held that, once it is known that the liquid contained alcohol, the percentage of alcohol in it could be found out by employing the hydrometer test. In other words, according to this decision, the Hydrometer test would be enough if the liquid was known to contain alcohol because it would help to determine the strength of alcoholic contents.

10. Another case cited was Ram Jus v. State, (1970 ALJ 1343) where a Division Bench of the Allahabad High Court had held that evidence based on chemical analysis was essential in order to establish that a substance alleged to be Ganja, recovered from an accused person, was really Ganja. In that case, reliance was placed upon the judgment of this Court in Boosenna's case (supra) from which the following was cited :

> "Except for a general statement contained in the evidence; of the witnesses, particularly, P.Ws. 1 and 4 that there was a strong smell of alcohol, emanating from the tins, which were pierced open, there is no other satisfactory evidence to establish that the article is one coming within the definition of the expression 'liquor'. Merely trusting to the smelling sense of the prohibition officers, and basing a conviction, on an opinion expressed by these officers, under the circumstances, cannot justify the conviction of the respondents. In our opinion, better proof by a technical person, who has considered the matter from a scientific point of view, is not only desirable, but even necessary, to establish that the article seized is one coming within the definition of `liquor'."

11. We think that it is not desirable to lay down an inflexible rule on questions of fact even though their determination requires the adoption of scientific methods and tests. It is really for the Court of fact to decide whether, upon a consideration of the totality of the facts in a case, it has been satisfactorily established that the objects recovered from the possession of the accused included liquor of prohibited strength. We see no reason why an accused person in the position of the appellant, who could presumed to have enough knowledge about the composition and strength of the prohibited liquor could not raise this question in the trial Court so that prosecution may cure whatever weakness there might be in the evidence on that point. We do not think that he should be

allowed to raise it at a stage when it may difficult or impossible to adopt the conclusive test.

12. Another question before us is whether the Excise Inspector, whose evidence was under consideration, had sufficient knowledge to be deemed to be an expert within the meaning of Section 45 of the Evidence Act so that the tests adopted by him, together with all the attendant circumstances, could establish beyond doubt the appellant was in possession of illicit liquor. We think that these are also essentially questions of fact. If there is sufficient evidence led by the prosecution to establish its case it becomes the duty of the defence to rebut that evidence. In the case before us, the appellant's Counsel cross-examined Shri C. B. Misra, P.W. 1 Excise Inspector, at considerable length, but the whole of this cross-examination was directed at showing that the recoveries were not made from the possession of the appellant. No question was put to him in cross-examination to suggest that the appellant questioned the composition or strength of the liquid recovered as alcohol of prohibited strength or the competence of the Excise Inspector to give his conclusion on the strength of tests adopted by him. Again, no defence evidence was led to indicate that the liquid could be anything else. These considerations would be sufficient to dispose the points raised on behalf of the appellant in the case before us. We may, however, observe that we agree with the High Court that the proposition contained in Boosenna's case (supra) must be confined to its own facts.

13. We find that the Excise Inspector who had deposed, at the very outset of his evidence that he had put in 21 years service as Excise Inspector and had tested lacs of simples of liquor and illicit liquor. As already pointed out, the competence of C. D. Misra to test the composition and strength of the liquid under consideration was not questioned at all. We, therefore, therefore think that this particular Excise Inspector could be treated as an expert within the meaning of Section 45 of the Evidence Act. The Excise Inspector had, in addition to employing the smelling test, used all the other tests he could reasonably adopt. If his competence to give his opinion or the sufficiency of the tests adopted by him had been questioned in the trial Court, the prosecution would have been in a position to lead more evidence on these questions. We also find that the objects recovered from the possession of the appellant almost proclaim the nature of his activity and of the liquid which could be in his possession. On the facts and circumstances of this case, neither Boosenna's case (supra) nor any other case would, we think, help the appellant. Consequently, we dismiss this appeal and affirm the conviction and sentence of the appellant. The appellant should surrender to his bail and serve out the sentence.

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