

Bhugdomal Gangaram and Others

Vs

State of Gujarat

Criminal Appeals Nos. 77, 109 and 153 of 1975

(P. N. Bhagwati, A. Varadarajan JJ)

19.04.1983

JUDGMENT

VARADARAJAN, J. -

1. These criminal appeals by special leave are directed against the judgment of the learned single Judge of the Gujarat High Court (C. V. Rane, J.) in Criminal Revision Application No. 462 of 1973 and Criminal Appeal No. 593 of 1973. Thavardas Parasram and Prabhakar Devram, accused Nos. 1 and 2 respectively, are appellants in Criminal Appeal No. 153 of 1975. Bhugdomal Gangaram and Gulabji Jesangji, accused Nos. 3 and 6 respectively, are appellants in Criminal Appeal Nos. 77 of 1975 and 78 of 1975 respectively. Shyamsunder Parbhuram, accused No. 5, is appellant in Criminal Appeal No. 109 of 1975. These five accused and Mohan Hairomal and Chandubhai Jivabhai Thakur, accused Nos. 4 and 7 respectively, were tried by the learned Judicial Magistrate, First Class, Matar in his Camp Court, Ahmedabad for offences under Section 65(a)(d)(e), 66(1)(b) and 81 of the Bombay Prohibition Act, 1949.

2. The fourth accused Mohan Hairomal died before he could be examined under Section 342 of the old Code of Criminal Procedure. The learned Magistrate acquitted accused Nos. 3, 6 and 7 of the entire charge framed under Sections 65(a)(d)(e) and 66(1)(b) and 81 and accused Nos. 1, 2 and 5 of the charge framed under Section 65(a) and (d) but convicted them under Sections 65(e), 66(1)(b) and 81 of the Act and sentenced each of them to undergo rigorous imprisonment for six months and pay a fine of Rs. 500 under Section 65(e) and rigorous imprisonment for four months and fine of Rs. 500 under Section 66(1)(b) and did not award any separate sentence under Section 81 of the Act. He ordered these accused to undergo imprisonment for two months under each of the two counts in default of payment of the fine. He directed that the taxi GTD 7555 be returned to the seventh accused and the truck GTD 4098 be sold and its sale proceeds to be confiscated to the Government.

3. The State of Gujarat filed Criminal Appeal No. 593 of 1973 against the acquittal of accused Nos. 3, 6 and 7 while Criminal Revision Application No. 462 of 1973 was filed by accused Nos. 1, 2 and 5 against their conviction and the sentences awarded to them by the learned Magistrate. The learned single Judge dismissed the appeal against acquittal of accused No. 7 and allowed it as against accused Nos. 3 and 6 and dismissed the criminal revision application, observing that the conviction of accused Nos. 1, 2, and 5 under Section 66(1)(b), 65(e) and 81 of the Act by the learned Magistrate is proper and that "even though there is no direct evidence to show that those accused were actually found selling prohibited liquor it can safely be held in view of the provisions of Section 81 of the Act that they attempted to commit the offence under Section 65(e) of the Act and also abetted each of them in the commission of that offence". The learned Judge further observed

that though the offence was committed as far back as in 1970 and accused Nos. 3 and 6 were acquitted by the learned Magistrate on May 11, 1973, as the quantity of the prohibited liquor concerned in this case was 40 drums of 5 gallons each these two accused Nos. 3 and 6 should be sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs. 500 each under Section 65(e) read with Section 81 of the Act and rigorous imprisonment for four months and fine of Rs. 500 each under Section 66(1)(b) of the Act and the ordered accordingly. He maintained the sentence awarded to accused Nos. 1, 2 and 5 under Section 66(1)(b) and 65(e) read with Section 81 of the Act.

4. Hence these appeals by special leave. The special leave granted to accused Nos. 1 and 2 in S.L.P. (Criminal) No. 428 of 1975 out of which Criminal Appeal No. 153 of 1975 has arisen has been restricted to the offence under Section 65(e) of the Act. The sixth accused Gulabji Jesangji died pending the appeal in this Court. Consequently Criminal Appeal No. 78 of 1975 has become infructuous. So in these Appeals Nos. 77, 109 and 153 of 1975 we are concerned with accused Nos. 1 and 2 as regards their conviction under section 65(e) read with Section 81 and with accused Nos. 3 and 5 as regards their conviction under Section 66(1)(b) and Section 65(e) read with Section 81 of the act and the sentences awarded to them by the learned single Judge.

5. After hearing learned counsel for both the parties we found that the offence under Section 65(e) read with Section 81 of the Act against all these four accused and the offence under Section 66(1)(b) of the Act against accused Nos. 3 and 5 have not been satisfactorily proved by the prosecution. Accordingly we acquitted these four accused on December 16, 1982 for reasons to be recorded later. Now we proceed to record our reasons.

6. The case of the prosecution was this : On September 12, 1970 in the evening Jayamalbhai Nakum (PW 12) the then Deputy Superintendent of Police, State Traffic Department, Ahmedabad (hereinafter referred to as PW 12) received information that the truck GTD 4098 carrying prohibited liquor was going to proceed from Baroda to Ahmedabad and that Bhugdomal (accused No. 3), Mohan Hairomal (accused No. 4) and some other would be coming behind the truck in a taxi. Therefore, after arranging for some SRP persons to come by a jeep and report to him at Kaira Excise Chowki post, PW 12 proceeded to that Chowki post in an Impala car. The jeep arrived at the Chowki post accordingly. PW 12 noticed the truck GTD 4098 passing from Nadiad to Kaira and going towards the crossing. When the police party signalled for the truck to stop it was driven in full speed on the national highway towards Ahmedabad. The taxi GTD 7555 which came behind the truck got a jerk and halted there. PW 12 instructed the police jeep driver to stop and detain the taxi and followed the truck in the Impala car and overtook the truck proceeding two furlongs away and asked the driver of the truck to stop it. After the truck was stopped PW 12 found the driver and conductor (accused Nos. 1 and 2) sitting in the cabin and 40 drums kept in the truck below tad patri. After directing two SRP constables to take care of the truck PW 12 came back to Kaira by the Impala car with some SRP constables and proceeded in the other road towards Nayka. On enquiry PW 12 learnt from some persons that a taxi was going ahead beyond Nayka.

7. Vithal Bhala of Nayka (PW 6) who was sitting in the S. T. bus stand at Nayaka at about 7 or 8 P.M. on that day saw four persons getting down from a taxi and going into Nayaka village. He also saw one jeep and a car coming from Kaira side and proceeding towards Navgam. Fateh Singh of Nayaka (PW 5) and others including Hasmukhlal (PW 1) produced accused Nos. 3 to 6 before the Police Patel Becharbhai (PW 2) at the Village Chora (Panchayat office) at about 8 p.m. Nayan Prasad (PW 4) saw accused No. 5 with bag-like thing in his hand entering the temple at Nayaka in a frightened condition a little earlier. PW 4 picked up a bag-like thing thrown away by accused No. 5

when he was being taken to the Village Chora and produced it before PW 2. When PW 2 questioned accused Nos. 3 to 6 who were produced before him they told him that they come to Nayaka for a walk.

8. PW 12 overtook the taxi when it was being driven by the seventh accused beyond Nayaka and brought the taxi and the seventh accused to Nayaka. PW 6 found that the jeep and car which proceeded towards Navgam, returned to the Nayaka S.T. bus stand. The officer PW 12 got down from the car and asked PW 6 whether four persons got down from the taxi. PW 6 answered in the affirmative. Thereupon PW 12 went to the Village Chora in his car with the taxi and seventh accused and took over accused Nos. 3 to 6 from PW 2 and left the place with all the seven accused after informing PW 2 that he would take later the plastic packet and papers which had been given to PW 2 by PW 4 earlier. PW 2 informed PW 12 that the packet and papers had been thrown by accused Nos. 3 to 6 before they were brought to the Village Chora.

9. PW 12 took accused Nos. 3 to 7 and the taxi GTD 7555 to the place where the truck GTD 4098 was stopped earlier on the national highway leading to Ahmedabad. He took two panch witnesses also from Nayaka to that place. After sending a messenger by the car to Ahmedabad for informing the Inspector General of Police about the occurrence and requesting to send an Inspector of Police for investigation, PW 12 seized the drums and certain other properties from the truck GTD 4098 under the panchnama Ex. 26 and took one bottle of sample from each of the drums.

10. On receipt of a telephonic message from the Inspector General of Police in the early hours on September 13, 1970, A. K. Mehta, Inspector of Police, Crime Branch (PW 18) proceeded to the place where the truck had been detained by PW 12, and reached that place at about 2.20 a.m. on September 13, 1970 when PW 12 was preparing the panchnama for the seizure of the properties from the truck. PW 18 arrested all the seven accused who were handed over to him by PW 12 along with the properties and the panchnama and all of them proceeded to Matar Police Station where PW 18 examined PW 12. Subsequently PWs 12 and 18 proceeded to Nayaka in two different vehicles. PW 2 produced before PW 18 a small plastic packet and the papers which had been handed over to him by PW 4 and they were taken by PW 18 under the panchnama Ex. 71. After PW 18 examined some witnesses at Nayaka on that day and some other witnesses later at other places, he sent the sample drawn by PW 12 to Baroda for chemical analysis. The samples were found to be diluted alcohol. After receiving the reports Exs. 110 to 149 from the Assistant Chemical Examiner, Baroda (PW 16) and completing the investigation PW 18 filed the charge-sheet on May 27, 1971.

11. When examined about the circumstances appearing against the accused in the evidence accused No. 1 stated that he was carrying only vegetables in the truck and was detained by the police illegally when he questioned the police about what had happened to the truck which was standing on the national highway with many people around. Accused No. 2 stated that when he was standing at the State Transport bus stand at Nayaka in the evening two policemen came and took him. Accused Nos. 3 and 5 admitted having gone to Nayaka along with accused Nos. 4 and 6 on September 12, 1970 and to have been produced before the Police Patel PW 2 and subsequently taken by the police. Two witnesses were examined on behalf of accused No. 1 to show that accused No. 1 was the driver of truck 4339 belonging to DW 1 in 1970.

12. We are concerned in these appeals with four sections of the Bombay Prohibition Act, 1949 and they are sections 2(41)(a), 65(e), 66(1) and 81. Section 65(e) lays down that whoever in contravention of the provisions of the Act, or of any rule, regulation or order made or of any licence, pass, permit or authorisation granted under the Act sells or buys any intoxicant (other than

opium) or hemp shall on conviction be punished for such offence with imprisonment for a term which may extend to three years and also with fine. According to Section 2(41)(a) 'sell' with its grammatical variations includes any transfer whether such transfer is for any consideration or not. Section 66(1) (b) lays down that whoever in contravention of the provisions of the Act or of any rule, regulation or order made or of any licence, permit, pass or authorisation issued under the Act, consumes, uses, possesses or transports any intoxicant (other than opium) or hemp shall, on conviction, be punished for a first offence with imprisonment for a term which may extend to six months and with a fine which may extend to one thousand rupees, for a second offence with imprisonment for a term which may extend to two years and with fine which may extend to two thousand rupees and for a third or subsequent offences with imprisonment for a term which may extend to two years and with fine which may extend to two thousand rupees. Section 81 lays down that whoever attempts to commit or abets the commission of an offence under the act shall, on conviction, be punished for such attempt or abatement with the same punishment as is provided for the principal offence. So far as accused Nos. 1 and 2 are concerned their conviction for the offence under Section 66(1)(b) of the Act by the learned single Judge of the High Court has become final as special leave in regard to that offence has been refused by this Court. It will follow from this fact that what was seized by PW 12 from the truck GTD 4098 in which they were found to be travelling was prohibited liquor, namely diluted alcohol so far as accused Nos. 1 and 2 are concerned. The evidence of PW 16, the Assistant Chemical Analyst shows that the samples extracted by PW 12 from each of the 40 drums found in the truck and examined by PW 16 were diluted alcohol. There is no dispute in this Court that the 40 drums seized from the truck contained prohibited liquor, for the possession and transport thereof there was no permit or licence. Even if the entire case of the prosecution is accepted we are of the opinion that accused Nos. 1, 2, 3 and 5 could not be convicted under Section 65(e) read with Section 81 of the Act for the Act makes a clear distinction between possession or transport on the one hand punishable under Section 66 (1)(b) and selling or buying or transporting any intoxicant (other than opium) or hemp punishable under Section 65(e) of the act on the other. There is no evidence to show that these appellants sold or attempted to sell or transfer the prohibited liquor which was found to be transported in the truck in which accused Nos. 1 and 2 were found to be seated when it was stopped by PW 12 on the national highway going to Ahmedabad from Kaira. It is not possible to agree with Mr. T. U. Mehta, learned counsel for the respondent that having regard to the quantum of the prohibited liquor found to be transported in the truck an inference of sale or transfer of the prohibited liquor could be drawn.

13. Accused Nos. 3 and 5 have been convicted by the learned single Judge under Section 66(1)(b) of the Act. The prosecution relies on the evidence of PW 12 to show that he had received information in the evening of September 12, 1970 that from Baroda the truck GTD 4098 would be carrying liquor to Ahmedabad and that accused Nos. 3 and 4 and some other persons would be coming in a taxi behind the truck. But since the informant has not been examined as a witness the evidence of PW 12 that he was informed that accused Nos. 3 and 4 would be coming behind the truck in a taxi is not admissible. The prosecution relies also upon the evidence of PW 12 that when he was waiting at Kaira at about 8 p.m. on that day the truck GTD 4098 passed from Nadiad to Kaira towards the crossing, that when the police party signalled for the truck to stop, it was driven at full speed on Ahmedabad side on the national highway, that the taxi GTD 7555 got a jerk and halted there and that he instructed his men to stop the taxi and proceeded in his car behind the truck GTD 4098 for stopping it. The prosecution also relies upon the evidence of PW 3, Natwarlal Manilal of Nayaka, PW 4 Nayan Prasad Bhatt of Nayaka, PW 5, Fateh Singh of Nayaka, PW 6, Vithal Bhala of Nayaka and Becharbhai, the Police Patel of Nayaka, PW 2 to show that accused Nos. 3 to 6 got down from a taxi at Nayaka and went into the village and were produced by PW 6 and others before PW 2, and

on the evidence of PW 12 that at some distance away from Nayaka he overtook the taxi GTD 7555 and found the seventh accused alone in the taxi and he brought the taxi with the seventh accused to Nayaka and proceeded to the Village Chora. The prosecution further relies upon the evidence of Harishanker PW 11 of Ahmedabad and of PW 5 and other witnesses including PWs 12 and 18 to show that the papers said to have been recovered by PW 18 from PW 2 on September 13, 1970 under the panchnama Ex. 71 were thrown away by accused No. 5 when he was being taken to the Village Chora. This recovery and evidence of PW 11 are relied upon for connecting accused No. 5 with the truck GTD 4098 which was carrying prohibited liquor. The evidence of PW 11 who claims to be maintaining himself by doing bhikshavarti is that one Pesumal put the truck GTD 4098 nominally in his name and was operating it himself with accused No. 5 as his manager and that Pesumal was paying him Rs. 50 or Rs. 1,000 once in one or two months. His evidence does not establish satisfactorily that Pesumal had put the truck nominally in his name or that accused No. 5 was the manager of the truck under Pesumal. If Pesumal was the real owner of the valuable truck it is not probable that he would have put it nominally in the name of PW 11. PW 11 has no personal knowledge about accused No. 5 working as manager with reference to the truck GTD 4098 and he has admittedly not seen the truck and accused No. 5 together at any time. Since Pesumal has not been examined as a witness the evidence of PW 11 that Pesumal told him that accused No. 5 was the manager of the truck GTD 4098 is inadmissible. The prosecution has failed to prove that accused No. 5 was the manager of the truck GTD 4098 on the relevant date.

14. Though accused Nos. 3 and 5 as well as accused Nos. 4 and 6 have admitted their presence at Nayka during the night of September 12, 1970 and to have been produced before PW 2 by some of the residents of that village and to have been subsequently taken by PW 12 to the place where the truck GTD 4098 had been detained by PW 2 earlier, the evidence about how these four accused have been produced before PW 2 is discrepant. PW 6 has stated in his evidence that all the four accused persons got down from the taxi and went into Nayka village. But he has admitted that he did not tell anyone until he was examined in the Court that he saw the taxi and four persons getting down from it. PW 5 has stated that three persons were seen going on the road near the rice mill at Nayka, that some persons including himself caught these three persons and took them to the Village Chora and that two or three minutes later PW 4 and some other persons brought accused No. 5 to the Village Chora. PW 4 has stated that he saw accused No. 5 with a bag-like thing in his hand entering the temple in a frightened condition, that he caught hold of him and took him to the Village Chora, that accused No. 5 threw away a paper bundle when he was being taken to the Village Chora and that he subsequently picked it up and produced it before PW 2. PW 3 has stated in his evidence that four persons went together into Nayka village in a frightened state after getting down from a taxi which was proceeding from Kaira to Ahmedabad and that they were produced before PW 2 at the Village Chora. PW 2 has stated that PW 4 and others come towards him along with accused Nos. 3 to 6 when he was proceeding towards the temple after hearing the alarm at 8 p.m. that some good as have entered the temple, and that subsequently PW 4 handed over one person to him and left the place and came back with the plastic packet containing some papers and produced it before him. There is discrepancy in the case of the prosecution about the seizure of the papers mentioned in the panchnama Ex. 71. The case of the prosecution is that all the four accused Nos. 3 to 6 were in possession of those papers and had thrown them away before they were produced before PW 2. But during the trial the prosecution has attempted to show that accused No. 5 alone was in the possession of the papers and that he threw them down when he was being taken by PW 4. It has to be noted that PW 18 has admitted in his evidence that PW 12 did not tell him anything about the plastic packet and the papers mentioned in the panchnama Ex. 71 when he examined him first at Matar Police Station at about 4 or 4.15 a.m. on September 13, 1970, that subsequently PW 12 told

him that some important papers of this case are with PW 2 at Nayka and that the therefore recorded an additional statement of PW 12 at about 5.30 a.m. at Matar Police Station. If accused No. 5 had thrown the plastic packet and the papers mentioned in the panchnama Ex. 71 and they had been handed over to PW 2 and PW 12 was aware of the existence of these papers in the custody of PW 2, it is improbable that PW 12 would not have seized the papers then and there from PW 2 or at least directed PW 2 to go with him along with the plastic packet and the papers if he was in a hurry to go to the place where the truck had been stopped. Nor would PW 12 have omitted to mention the important fact that the papers were in the possession of PW 2 when he was first examined by PW 18 at Matar Police Station at about 4 or 4.15 a.m. on September 13, 1970, and there would have been no necessity for PW 18 to record an additional statement of PW 12 under Section 161 of the Code of Criminal Procedure in this regard. In Ex. 71 which had been written by PW 18 it is stated that the papers mentioned in it were found in the plastic packet Article No. 2. But PW 18 has admitted in his evidence that Article No. 2 cannot hold those papers. In these circumstances, we are clearly of the opinion that the case of the prosecution that the plastic packet and other papers mentioned in the panchnama Ex 71 were thrown away by all the accused Nos. 3 to 6 or by accused No. 5 alone and that they were subsequently produced before PW 2 by PW 4 and were seized later by PW 18 is an afterthought intended to connect accused No. 5 with the prohibited liquor which was being transported by accused Nos. 1 and 2 in the truck. On a careful consideration of the evidence, we are of the opinion that it is not reasonably possible to come to the conclusion that accused Nos. 3 and 5 were connected with the prohibited liquor found in the truck GTD 4098. May be, one may suspect that accused Nos. 3 and 5 were concerned with the transport of the prohibited liquor in the truck. But any amount of suspicion will not constitute legal evidence for sustaining a conviction under Section 66(1) (b) of the Act. In these circumstances we are of opinion that interference of this Court with the conviction of accused Nos. 1, 2, 3 and 5 for the offences under Section 65(e) read with Section 81 and of accused Nos. 3 and 5 for the offence under Section 66(1)(b) is called for. We find that there is no evidence at all to prove these charges against these accused. We accordingly allow Criminal Appeal Nos. 77, 109 and 153 of 1975, set aside the conviction of accused Nos. 1, 2, 3 and 5 under Section 65(e) read with Section 81 of the act and of accused Nos. 3 and 5 under Section 66(1)(b) of the act and the sentences awarded to them and acquit them of those charges and direct the fine, if any, paid by them, to be refunded to them.

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