

CALCUTTA HIGH COURT

Mati Lal Chandra

Vs

Emperor

(Holmwood and Imam, JJ.)

01.05.1912

JUDGMENT

Holmwood and Imam, JJ.

1. This is an appeal from the judgment and sentence of the 2nd Presidency Magistrate of Calcutta who has convicted the appellants Mati Lal Chandra and Promotho Lal Chandra of transporting excisable articles from Chandernagore to Calcutta under Section 46, Act V of 1909, and of being in possession of excisable articles knowing the same to have been unlawfully imported under Section 52 of the same Act, both read with Section 55 of the Act, and sentenced them under Section 57 to a fine of Rs. 1,000 each, or in default to one month's rigorous imprisonment.
2. The facts are as follows: There is a manufactory of drugs known as the Indian Pharmacy Co. situate in French territory at Chandernagore within the compound of the distillery of the French Government. This factory is ostensibly owned by a lady named Giribala Dassi, widow of the gentleman who originally started the business.
3. The accused persons are her nephews, and the first is a pleader at Hooghly, and the second a clerk in the office of the Director of Commercial Intelligence in Calcutta. Their family house is at Chandernagore, but they seem to habitually reside in Calcutta. For the purposes of this case we may take it on the evidence, though the appellants disputed this, that these gentlemen both have an active interest in the management of the Chandernagore business. On the 29th August 1911 the accused No. 2 received an order from Messrs. B.K. Paul, wholesale and retail druggists in Calcutta, for three cases of tinctures consisting of 25 one-pound bottles of each of (i) tincture, of cinchona, (ii) tincture of cardamoms, (iii) spirits of nitric ether and (iv) tincture of ginger. This order is Exhibit B in the case, and is of some importance. It is headed "Indian Pharmacy," it is on a printed invoice slip of B.K. Paul and Co., and it says: "Please supply" the tinctures already mentioned, and is signed B.K. Paul and Co. admittedly by one Haridhan Nag, P.W. 2, who is manager and superintendent of the godown and signs for Messrs. B.K. Paul.

4. On the 2nd September, a Saturday, one Tarini Charan Mookerjee, alleged by the prosecution to be the sircar of the Indian Pharmacy, conveyed the three cases from Chandernagore to Howrah where they were consigned to him and took them thence in a carriage to Messrs B.K. Paul's godown at 16, China Bazar Lane and delivered them to the manager. The same evening a letter was received from the second accused (Exhibit 2) which is also of great importance and runs as follows: "Be your order of 29th August 1911. The medicines of the above order have been despatched under your instructions. Please order them to be opened and counted." Then follows an interpolation "in presence of our agent" in smaller writing and different, ink, but we have no reason to doubt it is in the same hand-writing, viz., that of P.L. Chandra.

5. The letter goes on: "The order of the 29th ultimo will be attached to the bill when it will be presented to you afterwards as is the custom with you and else-where. But it is impossible for us to attach it with our Invoice, as it has never been the practice with you or anywhere. Hope you will do what is needful. From this it would appear that some message, oral or Written, had been sent by Messrs. B.K. Paul to the second accused

6. On the 5th September the two accused came to B.K. Paul's shop, as they say, to discuss prices for a contract for which they were tendering, as Messrs., B.K. Paul expected to get a large order from the Government of the United Provinces or the Punjab. The correspondence seems to show it was connected with Oudh, but this is immaterial. An Excise officer saw them enter the shop and leave again for the godown at China Bazar. He informed Mr. Wilson, the Excise officer, who had long been on the look out for these Chandernagore medicine-sellers, and he went to the godown and says that he found them sitting at a table with price lists, one of which is Exhibit 1 before them, and the three boxes of medicines, two closed and one open. The letter (Exhibit 2) and the challan (Exhibit 3) and other documents (Exhibits 4 and 5) were found on the table. He made a search list (Exhibit 6) and seized all the articles. Upon this evidence the accused have been acquitted of importing excisable articles, but convicted of transporting and possessing the three cases of medicine in question.

7. The points raised in the appeal by the defence are (i) that these tinctures are not excisable Articles, (ii) that the accused are not proprietors of the Indian Pharmacy nor its agents, (iii) that T.C. Mukerjee is not their sircar but the agent of Messrs. B. K. Paul, or at least became so as soon as the goods were delivered to him for conveyance to them under a completed contract of sale, (iv) that the possession proved in this case at the time of seizure is the possession of B.K. Paul and Co., and not the possession of the accused, and (v) that to prove transport you must prove direct connection of the accused with the act of transport.

8. The first point gives rise to a question of law which is of extreme difficulty and importance, but in the view we take it is not necessary to the decision of this appeal. In Act VII of 1878 (B.

C.) excisable articles are defined as including spirituous and fermented liquors and intoxicating drugs as defined by this Act.

9. Fermented liquor includes malt liquor of all kinds, tari, fresh or fermented, pachwai, diluted or undiluted and any other intoxicating liquor which the Local Government may from time to time declare to be included in this definition.

10. Spirituous liquor includes any spirituous liquor imported into India or manufactured in India by any process of distillation.

11. Now in the case of *Gonesh Chunder Sikdar v. Queen-Empress*¹ Macpherson and Banerjee JJ. held that "spirituous liquor" in Section 53 of the Act is not intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition. The case would be different if alcohol was manufactured separately for the purpose of being used in the preparation of a medicine.

12. They point out that the terms "spirituous Liquor" is not defined in the Act. What is given as the definition of the term is, strictly speaking, no definition at all. It merely says "spirituous liquor includes, etc.," as above. But we observe that the medicinal preparation there under consideration was manufactured from gur or treacle mixed with other ingredients used for medicinal purposes. The Judges say the case would have been different if the accused had been found manufacturing alcohol or spirits separately for the purpose of being used in the preparation of a medicine. but what was found to have been manufactured in that case by the processes of fermentation and distillation is not alcohol or spirit separately, but the compound substance, the medicine at once.

13. Again, in an unreported case the judgment in which is filed with the record before us, Criminal Revision No. 180 of 1892, O'Kinealy and Ameer Ali JJ., held that spirits of wine, sold by a chemist for medicinal purpose, was not liable under the Excise Act. They rely on Section 66 of that Act, and they say that rectified spirits of wine is a drug and largely used in making up other drugs, and if a chemist sells it bond fide as a medical drug, and as a medical drug only he is not liable. In the case before us the articles are tinctures prescribed by the British Pharmacopoeia and there is no doubt as to their being bond fide medicinal preparations. Now, in the new Excise Act (Ben. V of 1909), a definition of liquor has been given and "excisable article" has been defined "as any liquor or intoxicating drug as defined by or under this Act." We have nothing to do with intoxicating drugs, and have only to see what the definition of liquor is and that definition runs as follows: "Liquor means intoxicating liquor, and includes spirits of wine, spirit, wine, tari, pachwai, beer, all liquids consisting of or containing alcohol and any substance which the Local Government may by notification declare to be liquor for the purpose of this Act."

14. It will be observed that the only defining, words in this clause are "Liquor means intoxicating liquor," and the rest of the clause is open to the observations made by the Judges in *Gonesh Chunder Sikdar's Case*.(1896) I.L.R. 24 Calc. 157(Supra). That the clause covers spirits of wine which is in itself, apart from its medicinal use a liquor which can be drunk as an intoxicating liquor there can be no doubt, and the decision in the unreported case we deferred to above has therefore been clearly overruled. But that *Gonesh Chunder Sikdar's Case* (1896) I.L.R. 24 Calc. 157(Supra) is no longer good law is not so clear. To be an excisable article liquor must be intoxicating liquor, and the enumeration of all the liquids that follow does not make them liquor unless they are intoxicating. Now, none of these drugs before us could conceivably be used as an intoxicating liquor. The poisonous drugs they contain would kill a man long before he had taken a sufficient quantity of alcohol to intoxicate him, and we can hardly think that the Legislature can have intended to penalize the use of a beneficent drug like sweet spirits of nitre which has saved the lives of thousands of children, and is the basis of all the most efficient fever mixtures in this country where malaria is the greatest scourge. The real object of this prosecution is to prevent smuggling of drugs prepared in French territory with French spirits into British territory. This can be effected under the Customs law; it is idle to urge that the Government cannot afford to keep up a Customs station, if necessary, on the French frontier.

15. As a matter of fact, it would be wholly unnecessary inasmuch as there is a Customs establishment at Hooghly, and the Station-master at Chandernagore, which station is in British territory, could be empowered to detain all articles exported from French territory, just as local Post-masters are empowered in respect of the parcel post and have them examined, if suspected, to contain articles liable to duty. It so happens that the Customs duty on drugs containing alcohol is exactly the same as that levied on excisable articles. The matter being *res Integra*, we should be, inclined to hold that the meaning of the Legislature in amending the Act was to prevent chemists and vendors of drugs selling intoxicating liquors or other wise dealing with them as medicinal preparations.

16. It in effect says you shall not sell brandy or gin or, other intoxicating spirits, because they are included in the British Pharmacopoeia under the names of *Spiritus Vini Gallici* or *Spiritus Juniperi*, etc., nor shall you by merely mixing a little cinnamon or other harmless medicament with spirits, palm oil: an excisable article as a bona fide medicine, and as one instance you shall not sell that exceedingly dangerous intoxicant rectified spirits of wine as a medicine without a license or transport it without a permit.

17. The argument that unfermented tart is not an intoxicating liquor does not help the prosecution inasmuch as that was also an excisable article under the old Act; and as it is impossible to say when it may become intoxicating by a natural process of fermentation over which the owner has

no control, the Legislature has very rightly declared it to be an intoxicating liquor from the first, as it is undoubtedly a potentially intoxicating liquor in its nature.

18. A rather curious argument which was adduced by the prosecution may be glanced at here, since it may be reproduced in other cases unless disposed of once for all.

19. This is that "juice drawn from any cocoanut" is mentioned, and the astounding argument is put forward that this refers to the milk of the cocoanut itself, whereas it is obviously to be read with the word "tree," the words being any cocoanut, palmyra, date or other kind of palm tree, and means the juice of the palm tree of whatever species and not its fruit.

20. A much stronger argument is derivable from the fact that "denatured spirit" is treated as an excisable article and is subject to duty under the Act. "Denatured" means effectually and permanently rendered unfit for human consumption. But it may be that "denatured spirit" is only excisable by virtue of the notification which makes it liquor. It certainly is not intoxicating liquor, and would not be excisable but for the special notification. Had it been necessary for the decision of this appeal to come to a finding whether all drugs bona fide prepared in accordance with the British or other recognised Pharmacopaeias were excisable merely because alcohol is used in their-preparation, we should have felt it our duty to refer the question to a Full Bench in this form--"Does the change in the law enacted in Act V (B.C.) of 1909 make the decision in *Gonesh Chunder Sikdar v. Queen-Empress* (1896) I.L.R. 24 Calc. 157(Supra) no longer sound law?"

21. The argument that the notifications of the Board treat all spirit used in the preparation of drugs as excisable articles has no force.

22. If the law is as we have above indicated, those notifications would be ultra vires if they said that the spirit found in the prepared drugs rendered the drugs themselves excisable. But they are careful to say nothing of the kind.

23. In the notification under Section 4 a new Clause (h), dated 6th January 1911, says that perfumed spirits and spirits used in drugs, medicines or chemicals, whether manufactured in India or imported from foreign countries, shall be taxed (if liable to taxation) as foreign and not as country liquor.

24. This cannot affect the question, though it may indicate that the Board of Revenue takes a different view of the law to what we do. That this is so, is patent from a letter on the record from the personal Assistant to the Excise Commissioner pointing out in answer to a question from the Indian Pharmacy that all their tinctures are liable to excise duty when imported into British India, unless they can prove that the spirit used is foreign liquor and has paid the full duty imposed thereon by the Indian Tariff Act or the Bengal Excise Act. But this is rather discounted by

another letter from the same gentleman to the Collector of Hooghly in which he says Ipecacuanha wine and tincture of Bryonia manufactured by Moti Lal Chunder of Chandernagore are proved by analysis to be of a strength of 100, 38, 54 or 61, 46 N. P. and 6, 40 N. P., respectively, and that they are therefore spirits and not medicines. This seems to admit that if they were bond fide medicines, as the articles in this case admittedly are, they would not be liable.

25. Then there is the notification under Section 19 imposing certain rates of duty upon spirit used in drugs, medicines, etc., which is Rs. 7-13 per proof gallon. This does not affect the question either. The spirits are undoubtedly excisable, but the finished drags are apparently in the view we have expressed not so. About 3 annas 6 pies would have to be laboriously collected on each bottle of tincture after analysis, and the duty would be impossible to collect. The procedure adopted in the firm of Messrs. David Waldie, who have a manufactory of drugs similar to the French one in British territory at Serampore, has been described to us at our request by the learned Counsel, Mr. P. L. Roy, for the Crown. We must here express our full appreciation of the very able and exhaustive way he dealt with the legal difficulties that arise in this case and the great help he gave us in elucidating them. It appears that the spirits used by them go up in bond, so that no Customs duty is paid, but Messrs. Waldie by arrangement with Government pay Excise duties on the finished tinctures on a declaration which Government Accepts that so much spirit goes to each gallon of tincture. This arrangement is no doubt convenient with a large firm having a permanent location at a British excise head-quarters, but it does not show that the finished drugs are excisable articles. It only shows that by special engagement Messrs. Waldie and Co. pay the duties on the spirits used after the drugs issue from their factory, and not before as they are liable to do. Obviously, this could not be done in the case of a small retail trade or of small imports from foreign territory made at odd times.

26. In the hitter case the Customs must intervene, and this brings us to the contention which counsel for the Crown necessarily had to make, that the decision of the learned 2nd Presidency Magistrate was erroneous when he held that the accused could not be convicted of importing. The learned Magistrate bases his contention quite rightly in oar opinion on the wording of Section 9, Sub-section (2). It is argued that the words "was liable on importation to duty" import the condition that the duty has been paid. But as the Magistrate points out, there is a clear distinction between imports and articles exported or transported. The Customs are supposed to look after imports of non-excisable articles and articles which are subject both to Customs and Excise.

27. If such articles escape the Customs, they can be dealt with by the Excise authorities either in transport or when an attempt is made to export then!, but the Excise duty on imports does not

apply to articles that are liable to a similar duty in the Customs. In other words two import duties cannot be charged, and it is not the business of the Excise to enquire whether the Customs have been paid until transport begins and the inland revenue is affected.

28. It is perfectly clear that these articles ought to have been dealt with by the Customs authorities; but because this was not done, the accused are not thereby rendered liable to punishment under the Excise Act. As regards the exemption notified under Section 90 of the Act, it is clear that the Board intended to exempt only such articles as had paid duty under Section 10, and wished to take powers to tax the spirit contained in tinctures which had not already paid duty. There is no doubt that such spirit can be taxed in transport or export, but that does not make the drugs excisable articles. Supposing the alcohol had been destroyed or masked by some chemical process in making the drag. It is clear from the wording of all the notifications that it is separated spirit and not the combined drug that is excisable. If, as we are inclined to hold, these drugs are not excisable articles, the Customs are the only authority that can deal with them. But assuming for the purposes of this case that they are excisable articles, we have now to see whether the present accused can be said to have transported them, and whether at the time of their seizure at 16, China Bazar Lane, they were in the possession of the accused. We think both these questions must be answered in the negative.

29. Section 46 says "of any person transports," and Section 55 which is the section relied on to make the owner or person interested liable by implication only applies to manufacture, sale or possession. It does not apply to import, transport or export. It is Section 56 which makes the holder of a license, permit or pass liable for the misconduct of his servant or agent in matters of import, transport or export, and it is not contended that the accused are the holders of licenses, permits or passes. The persons actually engaged in the transport are the manager, Sideshwar, who ordered it, and the Brahmin, Tarini Charan Mukherjee, who carried it out. It is faintly suggested that accused No. 2 might be charged with abetment of transport inasmuch as he took the order for the supply of, the goods. But to begin with, that is not what he is charged with, nor does the act of taking an order for foreign goods constitute an abetment of their, transport, though it might be an abetment of their import.

30. We do not think that the evidence is at all sufficient to make out that this Tarini Charan Mookerjee was a servant in the employ of the Indian Pharmacy, though he may have been a person acting on behalf of Sidheswar, the manager and of B.K Paul & Co., as a kind of go-between in this illicit trade.

31. It is in evidence that this Tarin Charan Mookerjee only personally conveyed goods to B.K. Paul & Co., though he countersigned the consignment, notes addressed to other firms.

32. Now the consignor being in French territory and not coming to the station himself to forward the goods, it is the practice of the Railway not to accept his signatures on the consignment bill, unless it is countersigned by some person who knows him. The countersignature of his own servant would obviously be of very little value to the Railway Company, and it must therefore be held that the Railway authorities regarded him as independent witness not in the sole employ of the Indian Pharmacy. It is clear that B.K. Paul & Co. alone derived benefit from this importation without duty from the French territory. They had been carrying it on for some years, and their managers must be regarded as accomplices. We cannot therefore place any reliance on their unsupported statement that T.C. Mookerjee was the sircar of the Indian Pharmacy, which they aver they learnt from tike accused themselves. The evidence of the Deputy Inspector of Excise, Hem Chunder Banerjee, who was employed to watch accused No. 2 and saw him in a number of chemist's shops canvassing his wares, is clear that he does not remember any other shop than B.K. Paul's that was supplied though T.C. Mookerjee. For the same reason we cannot accept their evidence that delivery had not been taken of the goods which form the subject matter of this consignment was still under discussion and a dispute still going on as to the presentation of the bill. The evidence is half-hearted and in consistent, and it is perfectly clear from the admissions made that the discussion of prices that Mr. Wilson found going on was with regard to the proposed tender for a large order by an up-country Government, and that accused said they could execute it at a lower rate than that quoted by other firms, or in their own price lists, if a large quantity was ordered.

33. Their price lists had been with B. K. Paul and Co. for years, and there is no evidence that they had ever been disputed. They had ordered the goods, had accepted their and were in possession both in law and fact. The mere presence of an agent of the seller to see that the goods are in order when opened does not keep the sale uncompleted. It is a common practice for wine merchants to indemnify their customers for bottles broken in transit, but that doesnot prevent the property passing to the consignee when delivery has been taken. We find on the evidence that the accused were not in possession, either actual or potential, of the incriminating articles.

34. That being so, the convictions and sentences must be set aside, and the finest paid must be set aside, and the fines if paid must be refunded.

Cases Referred.