

BOMBAY HIGH COURT

D.K. Merchant

Vs.

State of Bombay

Criminal Revn. Appln. No. 274 of 1958

(Vyas and Kotwal, JJ.)

23.04.1958

JUDGMENT

Vyas, J.

1. This revisional application which is filed by D.K. Merchant, the accused in Criminal Case No. 101 of 1956 which was heard and decided by the learned Judicial Magistrate, First Class, (Railways), Poona, raises an interesting point of law under the Bombay Prohibition Act, 1949.
2. The accused was convicted by the learned Magistrate of an offence under Section 65(a) of the Bombay Prohibition Act, 1949 and he was sentenced to suffer six months' rigorous imprisonment and to pay a fine of Rs. 1000/- or in default to suffer three months' further rigorous imprisonment. On an appeal by the accused to the Court of Session at Poona, the learned 2nd Additional Sessions Judge, Poona, confirmed the order of conviction and sentence passed upon the accused and he dismissed the appeal of the accused. It is from this order of dismissal of his appeal by the learned 2nd Additional Sessions Judge, Poona, that the accused has come in revision to this Court.
3. Now, the facts which gave rise to the prosecution of the accused may be briefly stated. The prosecution story is that the accused imported from Hyderabad-Wadi to Dehu Road on or about 19-9-1955 a spirituous drug labeled as "Cina 4-X". 13,568 bottles of this substance, contained in 140 wooden cases, were imported by the accused. No excise duty was paid in connection with this import. Upon these facts, the prosecution contended that the accused had contravened the provisions of Section 108 and Section 65, clause (a) of the Bombay Prohibition Act.
4. According to the prosecution, the consignment containing 13,568 bottles of Cina 4-X was booked at Sehore (Bhopal) to Wadi (Hyderabad) on 12-9-1935. The consignment was booked by the Central India Chemicals Ltd. and the consignee was N. Vazir and Company, Wadi

(Hyderabad). The consignment reached Wadi on 19-9-1955. Upon that date the consignee N. Vazir and Co. took delivery of the consignment and immediately thereafter N. Vazir and Co. re-booked the consignment to the accused D.K. Merchant at Dehu Road. The consignment arrived at Dehu-Road Station on 21st of September, 1955. Upon that day the accused met the Head Coaching Clerk at the Dehu Road Station and he asked for delivery of the consignment. On that occasion the accused handed over the original railway receipt to the Head Coaching Clerk and it was a receipt regarding the above mentioned consignment. The Coaching Clerk said that the accused would have to be taken to the station master. Thereupon, the accused said that he would return to take the delivery of the consignment. So saying, the accused left the Dehu Road railway station. The original railway receipt pertaining to the consignment remained with the station authorities at Dehu Road. The accused did not turn up to take the delivery with the result that the Station Master later informed the Police authorities that the consignment in question was smelling of alcohol. Thereupon, the Police attached the consignment on 24-9-1955. Upon these facts the Police charge-sheeted the accused for offences punishable under Section 65(a) and Section 108 of the Bombay Prohibition Act.

5. The defense of the accused was one of denial of guilt. He contended that he was not the consignee of the 13,568 bottles of Cina 4-X. He also contended that Cina 4-X was a medicinal preparation and further that it was unfit for use as an intoxicating liquor. The Courts below held, upon the evidence before them, that the accused had imported the consignment containing 13,568 bottles of Cina 4-X. They also held that the substance in question viz, Cina 4-X was a medicinal preparation and they further came to the conclusion that this medicinal preparation was not unfit for consumption as an intoxicating liquor. Upon this view of the matter which was taken by the Courts below, the trial Court convicted the accused under Section 65(a) of the Bombay Prohibition Act and the lower Appellate Court confirmed the said conviction.

6. Now, the learned Advocate Mr. O' Souza appearing for the applicant D.K. Merchant does not dispute the finding of fact that the goods in question were imported by the applicant. There is also no dispute before us as to the finding recorded by the Courts below, viz. that Cina 4-X which was imported by the accused was a medicinal preparation. The controversy in this case centres round the question whether Cina-4-X was fit for or unfit for use as an intoxicating liquor. The learned Assistant Government Pleader contends that it was fit for use as an intoxicating liquor, whereas the learned Advocate Mr. D'Souza contends that it was unfit for consumption as such.

7. Now, Section 2 clause (24) of the Bombay Prohibition Act defines liquor'. The definition provides that 'liquor' includes spirits of wine (denatured spirits) wine, beer, toddy and all liquids consisting of or containing alcohol and any other intoxicating substance which the State Government may by notification in the Official Gazette, declare to be liquor for the purposes of the Act. Then there is Section 24A of the Act which says that nothing in Chap. III of the Act shall be deemed to apply to any medicinal preparation containing alcohol which is unfit for use as intoxicating liquor. Now, in this case the Court.'; below have held that the substance'" Cina 4-

X which was imported by the accused was fit for use as intoxicating liquor, because its alcoholic content was 82 per cent as certified by the Chemical Analyser, This conclusion, in our view, is not sound. A mere alcoholic content of a substance is not an absolute or unerring criterion of its fitness or unfitness for use as intoxicating liquor. In this case as I have said there was 82 per cent ethyl alcohol in Cina 4-X which was imported by the accused. There is no evidence as to the constituents in the remaining 18 per cent except that one of these constituents was aetherio nitrosis. We do not know what quantity of these constituents in the remaining 18 per cent can be consumed without proving injurious to health. Constituents in a medicinal preparation are fit for use according to a prescribed standard. If the medicinal preparation is sought to be used an intoxicating liquor, the said prescribed standard is likely, almost certain, to be exceeded. It is clear, therefore, that the nature of all the constituents of a medicinal preparation and the quantity in which these constituents can be considered fit for use are factors which have a material bearing on the fitness or unfitness for use of the medicinal preparation as intoxicating liquor and unless there is evidence on these points, it would be incorrect to deduce from a mere alcoholic proportion in a substance that it is fit for use as intoxicating liquor.

8. When the Legislature put Section 24A on the statute book, it became necessary to provide for! a machinery for the determination, of fitness or I otherwise of a medicinal preparation for use as I intoxicating liquor and the Legislature itself provided for that machinery. That provision is made in Section 6A of the Act. Since such a provision is made in the Act by the Legislature, it is clear that the intention of the Legislature was that the said machinery must be resorted to whenever a question arises whether a particular medicinal preparation is fit or unfit for use as intoxicating liquor. When the Legislature expressly provides for a machinery for a certain purpose, it cannot be validly contended that the said purpose may be fulfilled in some other way. When a question arises whether a medicinal preparation is fit or unfit for use as intoxicating liquor, it is not left to the option of the State to determine that question in any manner which is considered appropriate by it. It must adopt the method provided by the Act in that behalf and the method is provided in Section 6A. Section 6A says :

"For the purpose of determining whether any-medicinal or toilet preparation containing alcohol or any antiseptic preparation or solution containing alcohol or any flavoring extract, essence or syrup containing alcohol is or is not an article unfit for use as intoxicating liquor, the State Government shall constitute a Board of Experts.....

These provisions are not merely directory, they are mandatory. There is inherent evidence to show that the provisions of Section 6A, are mandatory. If we turn to clause (6) of Section 6A, this is what clause (6) provides :

"It shall be the duty of the Board, to advise the State Government on the question whether any article mentioned in Sub-Section (1) containing alcohol is unfit for use as intoxicating liquor and on such other matters incidental to the said question as may be referred to it by

the State Government. On obtaining such advice the State Government shall determine whether any such article is fit or unfit for use as intoxicating liquor or not and such article shall be presumed accordingly to be fit or unfit for use as intoxicating liquor, until the contrary is proved."

It is clear, in our view, upon the examination, of the language of clause (6) of Section 6A, that whenever an occasion arises before the State for' determination whether a medicinal preparation is fit or unfit for use as intoxicating liquor, it must refer the matter to the Board of Experts, consider the advice-tendered by the Board and then in the light of that advice decide whether the article is fit or unfit for use as intoxicating liquor. It is obvious that before the State launches a prosecution upon the contention that a particular medicinal preparation is fit for use as intoxicating liquor, it must satisfy itself that it is fit for use as intoxicating liquor and this satisfaction under the Act is to be reached only upon a consideration of the advice tendered to the State by the Board of Experts. The prosecution launched without consulting the Beard of Experts is, therefore, invalid. In this case, it is not disputed that the matter was not referred to the Board of Experts and therefore, neither the State nor the Court has the benefit of the opinion of the Board of Experts. The Court must nave evidence before it before it can pronounce that a certain medicinal preparation is fit or unfit for use as intoxicating liquor and that evidence cannot be furnished by a mere alcoholic content of the preparation concerned.

9. For the reasons stated above, we are of the view that the prosecution of the accused in this case must fail. Accordingly, the revision application filed by the accused is allowed and the order of conviction and sentence passed upon the accused by the learned Magistrate, which was confirmed in appeal by the learned Judge, is reversed. Fine, if paid by the accused, must be refunded to him. The accused is acquitted and ordered to be discharged. The property to be returned to the accused after one month from the date of this order. Bail bond cancelled.
Revision allowed.