BOMBAY HIGH COURT

State

Vs.

Bhausa Hanmantsa Pawar

Criminal Appeal No.949/61, With Criminal Appeal No.974 of 1961

(Tambe and Chandrachud, JJ.)

08.12.1961

JUDGMENT

Chandrachud, J.

1. In a raid effected on the 24th of July 1959, two barrels containing wash of "Angurasava" and three boxes containing 109 bottles labeled as "Angurasava" were found in the house of the respondent. Samples taken from the barrels and the boxes were sent for analysis to the Chemical Analyzer and to the Principal, Podar Medical College, Bombay. As the report of the Chemical Analyzer showed that three out of four samples contained alcohol in varying degrees, the respondent and two others were charged of offences under Section 65(f), 66(b) and 83(1) of the Bombay Prohibition Act. The defence of the respondent was that he owns a manufactory which produces "Angurasava" - a medicinal preparation containing Ayurvedic ingredients which generate alcohol. In substance, the contention of the respondent was that "angurasava" being a medicinal preparation is outside the ambit of the Prohibition Act. Partly relying upon the certificate issued by the principal, Podar Medical College, Bombay, the learned Magistrate has acquitted the respondent, holding that the prosecution has failed to discharge the onus of proving that "Angurasava" is "prohibited liquor". Accused Nos.2 and 3 who are respectively the brother and father of the respondent have also been acquitted on the ground, mainly, that the evidence did not indicate that they had any connection with the pharmacy of the respondent. By this appeal, the State of Maharashtra challenged the order of acquittal in so far as it concerns the respondent.

2. In support of the allegation that the respondent was in possession of the wash and the bottles labelled as "Angurasava", the prosecution examined four Police Officers and a panch. The evidence of these witnesses has no relevance on the question which now arises before us, for, it is not disputed that the barrels and the bottles were found in the house of the respondent. The sole question which arises for our determination is whether it is established that the liquid described

as "Angurasava" is "intoxicant", the possession of which is prohibited under the Bombay Prohibition Act. To substantiate the allegation that Angurasava is such an intoxicant, reliance is placed on the contents of the certificates issued by the Chemical Analyzer and the Principal of the Podar College, Bombay. The certificate of the Chemical Analyzer which is at Exhibit 9 says that three out of four samples contained

> "2.2 and 6 per cent. V/V. of ethyl alcohol respectively and they contain yeast. No alkaloidal ingredient or metallic poison was detected in them".

The certificate of the Principal of the Podar Medical College which is at Exhibit 10 reads as follows: "Formula supplied is found to be similar to that given in the Ayurvedic Books. There are no easy methods to find out the herbal drugs dissolved in a liquid. It is not possible for us, to find out the herbal drugs used in the above liquids. The colour and smell of the samples supplied is not identical with the colour and smell of fermented Ayurvedic preparation like, assav and Arishta. Hence it is very difficult to give any definite opinion in the matter".

3. Mr. Rane, who appears on behalf of the Slate, contends that the certificate of the Chemical Analyzer establishes that the bottles which were seized from the respondent contained alcohol in different measures and that, therefore, the respondent must be held to have committed an offence under Section 66(b) of the Bombay Prohibition Act. On the same reasoning, says Mr. Rane, the respondent must also be held guilty under Section 65(f) of the Prohibition Act, because the sample of the wash also contained alcohol. The question which we have to determine is whether on a mere finding that the wash and the liquid which was found in possession of the accused contained alcohol, he can be held guilty for being in possession either of material to manufacture prohibited liquor or for being in possession of prohibited liquor. Section 12 of the Bombay Prohibition Act, in so far as is material, provides that no person shall manufacture liquor or possess liquor. Section 13, in so far as is material, provides that no person shall have in his possession, any materials for the manufacture of liquor. Consequent upon the decision of the Supreme Court in *State of Bombay v. F.N. Balsara*[1], declaring that provisions of Sections 12(c), 12(d) and 13(d) are invalid to the extent to which they affected the possession, use, sale and purchase of medicinal and toilet preparations, the Bombay Legislature enacted Act No.XXVI of 1952 by which Section 24-A was added to the Bombay Prohibition Act. Section 24-A provides that nothing in the chapter in which sections 12 and 13 amongst other sections appear shall be deemed to apply to:

> (1) Any toilet preparation containing alcohol which is unfit for use as intoxicating liquor;
> (2) any medicinal preparation containing alcohol which is unfit for use as intoxicating liquor;
> (3) any antiseptic preparation or solution containing alcohol which is unfit for use as intoxicating liquor;
> (4) any flavoring extract, essence or syrup containing alcohol which is unfit for use as intoxicating liquor. Provided that such article corresponds with the description and

limitations mentioned in Section 59-A".

4. The learned Assistant Government Pleader contends that once it is established by the prosecution that what was seized from the possession of the accused contains alcohol the burden of proving that the preparation of the liquid falls under Section 24-A is on the accused. We cannot accede to this submission because to accept this argument is to hold that Section 24-A of the Bombay Prohibition Act is in the nature of an exception to the general provisions of that Act. Both the language and the legislative history of Section

[1](1951) SCR 682

24-A shows that it cannot be construed as carrying out an exception from the general provisions of the Act. What that section does, is to declare that the preparations specified therein are outside the pale of the Prohibition Act. The genesis of the law contained in Section 24-A is that in seeking to restrain the possession, use, sale and purchase of medicinal and toilet preparations, the State Legislature was imposing unreasonable restrictions on the right to acquire, hold and dispose of property, guaranteed by Article 19(1)(f) of the Constitution. It therefore became necessary to declare that those preparations were not intended to fall within the mischief of the Act. It is not as if the toilet and medicinal preparations would fall under Sections 12 and 13 but for the provisions contained in Section 24-A of the Act. The effect of the decision of the Supreme Court in Balsara's case, 1951 SCR 682 can only be that any restraint on the *bona fide* use of medicinal and toilet preparations was unconstitutional and therefore void. The burden, therefore of establishing that a particular article does not fall under Section 24-A rests, in our opinion, on the prosecution. What the prosecution is called upon to do in a case in which charges such as the ones in the present ease are leveled against the accused, is to prove that the liquid seized from the accused is prohibited liquor, and the implication of that burden can only be that the prosecution must also establish that the liquid which is seized from the accused is not of a description mentioned in Section 24-A of the Bombay Prohibition Act. The question therefore which we have to decide is whether the prosecution can be said to have established that the liquid which was found in the possession of the accused is a liquid which does not fall under sub-section (1) of Section 24-A of the Bombay Prohibition Act. Sub-section (2) of Section 24-A provides that the Act will not apply to medicinal preparations containing alcohol which is unfit for use as intoxicating liquor. The first question to which we have to apply our mind is whether the preparation called "Angurasava" is a medicinal preparation such as is exempted under sub-section (2) of Section 24-A of the Act. On the question as to whether the preparation is a medicinal preparation, the learned Assistant Government Pleader relies more on the certificate of the Principal of the Podar Medical College, than on the certificate issued by the Chemical Analyzer. We are afraid, we cannot permit the learned Assistant Government Pleader to place any reliance on the former certificate which appears at Exhibit 10, because the opinion expressed in that certificate cannot be treated as legal evidence. It is beyond controversy that, normally, in order that a certificate could be received in evidence, the person, who has issued the certificate must be called and examined as a witness before the Court. a certificate is nothing more than a mere opinion of the person who purports to have issued the certificate, and opinion is not

evidence until the person who has given the particular opinion is brought before the Court and is subjected to the test of cross-examination. The certificate of the Principal Podar Medical College, without more, not being evidence and Section 510 of the Code of Criminal procedure or Section 129-B of the Bombay Prohibition Act, which contain special rules of evidence being inapplicable to such a certificate, the reliance placed by Mr. Rane thereon is, in our opinion, misconceived. The contents, therefore, of the certificate issued by the Principal of the Podar Medical College cannot form the basis of a finding that the preparation is not a medicinal preparation.

5. Apart from the legal aspect, even on facts it seems to us impossible to accept the contention advanced on behalf of the State, that the certificate of the Principal of the Podar Medical College establishes that the preparation which was found in possession of the respondent is not a medicinal preparation. The certificate shows that the formula supplied is a formula of an Ayurvedic medicinal preparation and is similar to the one which is found in Ayurvedic Books. The certificate also shows that it was not possible for the Principal "to find out the herbal drugs" which were used in the "Angurasava", a sample of which was supplied to him. In view of the statement contained in the certificate that "it is very difficult to give any definite opinion in the matter", we must reject the argument advanced on behalf of the State that the certificate proves that the preparation is not a medicinal preparation.

6. Turning then to the certificate of the Chemical Analyser, it says that the samples contained ethyl alcohol varying from 2 per cent. to 6 per cent. v/v. The defence of the accused is that Angurasava is a medicinal preparation, and there is nothing in the certificate of the Chemical Analyzer which negatives that defense. The certificate does not set out a full and complete result of the analysis of the substance which was sent to the Chemical Analyzer for examination. In the absence of any evidence to show that the other ingredients of the preparation were not such as to make the preparation a non-medicinal preparation, we are unable to hold that the defense of the accused is not reasonably true. The learned Magistrate has, in fact, accepted the defense of the accused and no reasons have been shown by the learned Counsel on behalf of the State, why we must take a view different from the one taken by the learned Magistrate.

7. While dealing with the argument which arises under Section 24-A, it would be necessary to make a reference to the provisions contained in Section 59-A of the Bombay Prohibition Act. Preparations mentioned in Section 24-A would fall beyond the scope of the Prohibition Act, only if the provisions of Section 59-A are complied with. Section 59-A provides that:

> "(1) No manufacturer of any of the articles mentioned in Section 24-A shall sell, use or dispose of any liquor purchased or possessed for the purposes of such manufacture under the provisions of this Act, otherwise than as an ingredient of the articles authorized to be manufactured there from. No more alcohol shall be used in the manufacture of any of the articles mentioned in Section 24-A than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the articles:

Provided that in the case of manufacture of any of the articles mentioned in Section 24-A, in which the alcohol is generated by a process of fermentation the amount of such alcohol shall not exceed 12 per cent by volume".

The defense of the accused is that he manufactures a medicinal preparation in which alcohol is generated by a process of fermentation. In order, therefore, that the preparation which is claimed to be a medicinal preparation, may fall within the four corners of Section 24-A of the Bombay Prohibition Act, it is necessary that the alcohol which is found in this preparation must not exceed 12 per cent by volume. The certificate of the Chemical Analyzer is clear on the point that the samples contained alcohol varying from 2 per cent to 6 per cent by volume. The condition laid down in Section 59-A of the Bombay Prohibition Act is therefore satisfied.

8. If the preparation, therefore, is a medicinal preparation and if it also complies with the requirement of Section 59-A of the Prohibition Act, then the next question to which we have to address ourselves is, is this a preparation which is unfit for use as intoxicating liquor such as is exempted by Section 24-A of the Prohibition Act? Being a medicinal preparation, it must of course be fit for use as a medicinal preparation. The question which arises under Section 24-A, sub-section (2), is, is this medicinal preparation which contains alcohol such as is fit for being used as intoxicating liquor? In other words, the question is whether the medicinal preparation can be normally taken by a person in a normal dose as an intoxicating liquor. In order to determine this question, we must necessarily take into account the percentage of alcohol which is found in the preparation. If the percentage of alcohol found in a medicinal preparation is very high, then it may be possible to take the view that the preparation is such as is fit for being used as intoxicating liquor and since what Section 24-A exempts, is a medicinal preparation containing alcohol which is unfit for use as intoxicating liquor, a particular preparation containing a high percentage of alcohol may fall within the mischief of the Prohibition Act. In the case before us, the preparation, in the first place, is shown to be a medicinal preparation and the certificates of the Chemical Analyzer and of the Principal of the Podar Medical College are not destructive of the defence taken by the accused. In the second place, the preparation also complies with the requirements of Section 59-A because alcohol which is found in the medicine is generated by a process of fermentation and not more than 12 per cent. of alcohol by volume is detected in the preparation. On the question as to whether this medicinal preparation which contains alcohol of less than 12 per cent by volume is unfit for use as intoxicating liquor, no evidence has been led by the prosecution to show that it is fit for being used as intoxicating liquor. Mr. Rane contends that the burden of establishing that the preparation is not unfit for being taken as intoxicating liquor, is not on the prosecution but that it is for the accused to prove in the first place that the preparation is a medicinal preparation, and in the second place that this medicinal preparation is not fit for being used as intoxicating liquor. In view of the judgment of the Supreme Court in *State of Bombay v. Narandas Mangilal*[2], it is impossible to accept the contention of Mr. Rane. Mr. Justice
J.C. Shah, who delivered the judgment of the Bench, observes in the judgment that:

> "In a criminal prosecution, normally the burden lies upon the prosecution, to prove all the ingredients which constitute the offence charged against the accused, and we are unable to agree with the submission of the Solicitor General that a different rule is indicated in the trial of offence under the Act. It was for the State to prove that the substance seized, if a medicinal preparation was not unfit for use as intoxicating liquor. The State has even under the Prohibition Act, to establish that the respondents had infringed the prohibitions contained in Sections 12 and 13. Undoubtedly, by virtue of Section 24-A the prohibition do not apply to certain categories of toilet, medicinal, antiseptic and flavouring preparations, even if they contain alcohol; but on that account the burden lying upon the State to establish in any given case in which it is alleged that the accused has infringed the prohibition contained in Sections 12 and 13 that the infringement was not in respect of an article or preparation which was covered by Section 24-A is not shifted on to the shoulders of the accused. Section 24-A is, in substance, not an exception; it takes out certain preparation from the prohibitions contained in Sections 12 and 13".

In view of the judgment of the Supreme Court, it is clear that the burden of establishing

[2] Criminal Appeal No.65 of 195

that the substance is not unfit for use as intoxicating liquor, is on the prosecution. As we have observed earlier, this burden the prosecution has failed to discharge in the present case and we must therefore, hold that the prosecution has failed to establish that the substance seized from the respondent is prohibited liquor within the meaning of the Bombay Prohibition Act.

9. The learned Assistant Government Pleader finally urges that the observations contained in the judgment of their Lordships of the Supreme Court, cited above are capable of the construction that the burden of establishing that a particular substance is medicinal preparation is on the accused and that it is not for the prosecution to prove the negative. While dealing with this argument, it must be mentioned that the facts of the case before the Supreme Court, were in material respects different from the facts of the case before us. In the case before the Supreme Court, the prosecution had led positive evidence to establish that the preparation which was manufactured by the accused was not a medicinal preparation. The defense of the accused in that case was that the preparation was an Ayurvedic medicine called "Mrugmadasav". The prosecution led evidence to show that "Mrugmadasav" normally contains musk or kasturi which is priced at Rs. 60 to Rs. 80 per lb. Taking into account the fact that a bottle of "Mrugmadasav" the contents of which weighed 1 lb. was sold by the accused at the price of Rs. 1-12-0, the Supreme Court held that it was highly unlikely that the preparation could be "Mrugmadasav" as was claimed by the accused. The prosecution had also led evidence in that case, to show that the samples which were sent to the Chemical Analyzer were found to contain as high a percentage of alcohol as 75 to 79 per cent. Taking into account these two circumstances, the Supreme Court came to the conclusion that in the first place the preparation was not a medicinal preparation and that, secondly, the preparation was such as was fit for being used as intoxicating liquor. In

dealing with the question as to whether the preparation was fit for being used as an intoxicating liquor Mr. Justice Shah has observed in his judgment that what is necessary to find out in such cases is whether the medicinal preparation is capable of intoxicating when it is taken in a normal dose in which any "Asava" may be consumed. In the present case, the "Angurasava" which was found in possession of the accused is found to have contained alcohol varying from 2 to 6 per cent by volume. Applying the test laid down by the Supreme Court, it seems to us impossible to come to the conclusion that either the burden of establishing that the liquid which was found in his possession was unfit for use as intoxicating liquor was on the respondent or that, as a matter of fact, "Angurasava" contained such a percentage of alcohol that taken in a normal dose in which it would normally be taken, it was capable of being used as intoxicating liquor. In our opinion therefore, the learned Magistrate was justified in coming to the conclusion that the prosecution had failed to prove that the accused had committed an offence either under Section 65(f) or Section 66(b) of the Bombay Prohibition Act.

10. We, therefore, confirm the order of acquittal and dismiss the appeal filed by the State.
11. The questions which arise in Criminal Appeal No.974 of 1961, are identical with the questions which we have discussed above. There is, however, one additional point which arises in this appeal and which must be dealt with.

12. A few facts of the case are that certain bottles labelled as "Angurasava" were found in possession of the accused. The accused was convicted by the trial Court, but the learned Additional Sessions Judge acquitted him in appeal. The reason why the learned Additional Sessions Judge acquitted the accused is that the preparation was a medicinal preparation and that it was not established that the preparation either contained more than 12 per cent. alcohol or that it was fit for being taken as an intoxicating liquor. The learned Assistant Government Pleader contends that the certificates of the Chemical Analyzer show that the liquid which was seized from the possession of the accused, is not a medicinal preparation. If we turn to the two certificates issued by the Chemical Analyzer they make a somewhat interesting reading. The two certificates are at Exs.22 and 23. The bottles were seized from the accused on the 18th of April 1959, and they were sent to the Chemical Analyzer on the 22nd of September 1959. The first of the two certificates at Ex.22 is dated the 9th October 1959. That certificate says that the sample contained 6 per cent. v/v. of ethyl alcohol and that it also contained yeast. The certificate further states that the sample was not a toilet preparation. After this certificate was received, it appears that the Sub-Inspector of Police who was investigating into the case, addressed a further query to the Chemical Analyzer in response to which the Chemical Analyzer sent another certificate which appears at Ex.23 and is dated the 7th of February 1960. That certificate says that no recognisable medicinal ingredient was detected in the sample. The learned Assistant Government Pleader argues that the second certificate clearly shows that the substance which was seized from the accused is not a medicinal preparation. It must, in the first place be remembered that the certificate which was issued by the Chemical Analyzer on the 9th of October 1959, does not say that the preparation had no medicinal ingredients in it. It was only after the Sub-Inspector of

Police made a further query, that the Chemical Analyzer issued the second certificate in which he stated that no recognizable medicinal ingredients were detected in the sample. The infirmity of the second certificate is that it is not shown that before sending the second certificate, the Chemical Analyzer had made a fresh analysis of the substance which was sent to him for examination. Nor indeed does it appear from the record, and there is no justification for the assumption, that the Chemical Analyzer stated in the second certificate what he had discovered in the earlier analysis but had omitted to mention in the first certificate. The certificate, therefore which the Chemical Analyzer gave on the 2nd of February 1960 can, in our opinion, have no appreciable evidentiary value. That is a certificate which seems to have been issued more on a recollection of what the Chemical Analyzer did in October 1959, than on the basis of what he actually found in February 1960.

13. There is yet another argument advanced by Mr. Rane which must be noticed. Mr. Rane says that under Section 129-B, of the Bombay Prohibition Act, any document purporting to be a certificate under the hand of a Chemical Examiner or Assistant Chemical Examiner to Government, may be used as evidence of the facts stated in such certificate and that, therefore, the certificate at Ex.23 must be accepted as evidence of the fact that no recognizable medicinal ingredients were detected in the sample. It is true that Section 129-B of the Prohibition Act, permits the use of the certificate as evidence in support of the facts stated in the certificate. The evidence of the Chemical Analyser, however, treating the certificate as evidence, is no more than opinion evidence. All that section 129-B of the Prohibition Act does, is to do away with a settled rule of law that a certificate is not evidence unless the person who has given the certificate is examined as a witness. By reason of the provisions contained in Section 129-B, it is not necessary for the prosecution to examine the Chemical Analyzer as a witness and the objection which it would normally be open to the defiance to take that the certificate is not admissible in evidence unless the person who has given the certificate is examined as a witness may not be available to it. The provision, however, that the certificate of the Chemical Analyzer is admissible in evidence, cannot justify the argument that the certificate is conclusive of the facts stated therein. Even though, therefore, it is open to the prosecution to rely upon the certificate as constituting evidence in support of the facts which are stated in the certificate, the question whether what is stated in the certificate is good evidence or not, must always be a question for the courts to decide. The very language of section 129-B that the certificate "may be used as evidence of the facts stated therein" would seem to indicate that the certificate is not a conclusive piece of evidence and that the probative value to be attached to the certificate must depend upon a variety of circumstances such as the data available to the Analyzer, the method of analysis adopted by him, the fullness of his conclusions, and, speaking generally, the vulnerability to which his premise is subject. In the certificates which we have before us nothing more than a mere opinion of the Chemical Analyzer is stated. In order that a certificate may inspire confidence in the mind of the Court, it is not sufficient that the Chemical Analyzer merely records his negative opinion. The question which we have to determine in the present case is whether a particular preparation is a medicinal preparation. The Chemical Analyzer has not

stated in his certificate as to what were the ingredients which were actually discovered in the sample. In the absence of any material in the certificate from which it could be reasonably ascertained as to what were the other ingredients of the sample, it is impossible for us to accept the mere word of the Chemical Analyzer that the preparation is not a medicinal preparation because it contained no medicinal ingredients. If the Chemical Analyzer were to specify in his certificate what particular ingredients were found in the sample and then to say that in his opinion these ingredients are not medicinal, it would have been possible for the accused to challenge the opinion by showing that the ingredients which according to the Chemical Analyzer are not medicinal do in fact bear medicinal properties. To permit the prosecution to rely upon a mere negative opinion without making available to the accused the grounds on which that opinion is based, seems to us to be an unwarranted procedure, a procedure which runs counter to the well-established restrictions subject to which alone opinion evidence can be accepted. We may seem to repeat, but it is necessary to emphasize that Courts are not bound to accept evidence merely for the reason that the Legislature has made that evidence admissible. Mr. Rane contends that it was open to the accused to apply to the Court for summoning the Chemical Analyses as a witness and that his failure to do so must be construed as a failure to challenge the statements contained in the certificates. It is true that section 129-B gives to the accused an unqualified right to have the Chemical Analyses summoned and examined as a witness, but it is elementary that in a criminal trial, the primary duty of the Court is to find out whether on the evidence led by the prosecution, the charge can be said to have been brought home to the accused. If the evidence led by the prosecution is such as could sustain the conviction, the failure of the accused to challenge that evidence may conceivably affect his defence. If, on the other hand, the prosecution evidence falls short of that standard of proof which is required by law, the bridge cannot be gulfed by calling in aid the supposed failure of the accused to challenge that evidence.

14. There is one more aspect of the case to which it is necessary to call attention. Section 129-B, in so far as is relevant, concerns itself only with the certificate issued by the Chemical Examiner under section 129-A of the Act. What is rendered admissible by Section 129-B is not every certificate issued by the Chemical Examiner but only such certificates as are issued under Section 129-A. Section 129-A in turn provides that the blood collected from the body of a person, who is reasonably believed to have consumed an intoxicant may be sent for test to the Chemical Examiner, who is required by sub-section (2) to certify the result of the test.It is this certificate which is made admissible by section 129-B. Reading sections 129-A and 129-B of the Act together it seems to us plain that a certificate issued by the Chemical Examiner (who may be reasonably assumed to be the same as Chemical Analyses) is admissible provided that the certificate contains the result of the analysis of the blood collected or extracted from the body of a person. Section 129-B of the Prohibition Act, does not cover cases like the present one in which the certificate of the Chemical Analyses relates to the nature of a preparation, claimed to be medicinal, which is submitted to him for analysis. In cases like the one we have before us, it is section 510 of the Criminal Procedure Code, which would apply and the observations which we have made on the merits of the argument in relation to section 129-B of the Prohibition Act, must

equally apply to the considerations arising under Section 510 of the Criminal Procedure Code.

15. For these reasons, we are unable to accept the contention advanced by the learned Assistant Government Pleader that the certificate issued by the Chemical Analyses must be held to establish that the substance which was found in possession of the accused is not a medicinal preparation. It must also be mentioned that the first certificate which the Chemical Analyzer issued says that the preparation contains yeast and the evidence of the Sub-Inspector of Police who was examined as a witness for the prosecution, shows that yeast has medicinal properties. In our opinion, therefore, the learned Additional Sessions Judge was justified in acquitting the accused on the ground that the prosecution had failed to prove that the liquid found in possession of the accused was prohibited liquor within the meaning of the Bombay Prohibition Act.

16. The appeal filed by the State will, therefore, be dismissed and the order of acquittal passed by the learned Additional Sessions Judge will be confirmed.
Appeals dismissed.