

BOMBAY HIGH COURT

State

Vs.

Madhukar Gopinath Lolge

Criminal Appeal No. 612 of 1963

(Abhyankar, J.)

19.11.1963

JUDGMENT

Abhyankar, J.

1. This is an appeal by the State challenging the acquittal of Madhukar Gopinath Lolge, a tonga driver, of Ahmednagar, under Section 66 (1) of the Bombay Prohibition Act, by the Judicial Magistrate, First Class, III Court, Ahmednagar.

2. The Respondent, Madhukar, was charge-sheeted before the Judicial Magistrate, First Class, Ahmednagar, on the accusation that on 13th September 1962, early in the morning, at about 2-30 O'clock, the respondent, Madhukar, and his co-accused, Khandu, were found going on a bicycle, carrying illicitly distilled country liquor in two bladders having a total quantity of 24 bottles. They were thus charged with having committed offences under Sections 66 (1) (b) and 83 of the Bombay Prohibition Act.

3. Both the accused pleaded not guilty. The respondent Madhukar stated in his examination, under section 342 of the Code of Criminal Procedure, that he had been falsely implicated in this case by the Police Inspector Pawar, that he was in the service of one Vithal Hari Lagade as a tonga driver who owned a tonga, that on the night in question, at about 1-30 a.m., he had returned to the Sarjapura locality in the tonga from the railway station, that he kept the tonga and its horse behind the Police Head Quarters and started going home on foot. When he came near the chowk in the Sarjapura locality, a policeman came near him in a jeep car and told the respondent that he was called by the Home Inspector Pawar. He was taken in the Jeep car near the petrol pump. He was beaten by the Home Inspector. At that time two rubber bladders and one bicycle were found lying near the Police Inspector Pawar. He denied that he had ridden the bicycle or that he had borrowed it from anyone. He also denied that he was transporting liquor on that bicycle. He further alleged that he was implicated on a mere suspicion and that the witness

Shankar Kadekar who was examined as a Panch, had given false evidence as he had not given him a free lift in his tonga.

4. At the trial the prosecution examined one Shankar Kadekar, who in his examination-in-chief supported the prosecution case to a substantial extent, but admitted in cross-examination that his elder brother Gulab was a policeman and that since the last 2 or 3 years Gulab was serving as an orderly constable under the Police Inspector Pawar who had challenged this case. He also admitted that this Gulab occupies quarters in the Police Head Quarters and that the witness was also residing with Gulab. To further questions by the Court, the witness also admitted that he had made certain statements before the Court because he was told to say so by the Inspector Pawar and that he had made a false statement in his examination-in-chief that he had seen accused Nos. 1 and 2 throwing down the bicycle and running away. It is obvious, therefore that this witness did not inspire the confidence of the Magistrate and not much reliance has been placed on the testimony of this witness in this Court either.

5. The second witness examined by the prosecution was one Rabha Hari, who apparently supported the prosecution case in his examination-in-chief, but gave it up altogether when he stated that he failed to disclose during investigation that the respondent was then driving the bicycle or that the other accused was on the bar of that bicycle. He admitted that he had seen accused No. 2 for the first time in Court after he saw him on that night and that he could see the face of accused No. 2 that night for a second. Even the testimony of this witness was not therefore of much assistance to the prosecution.

6. The third witness is one Shaikh Shabir Hussain Rajabali. Possibly he was examined to show that the bicycle, which was seized at the spot, was hired or borrowed by the respondent, Madhukar, but the witness did not support this part of the prosecution case. In fact, he stated that he has given this bicycle to one Moti Mohomed, that Moti Mahomed did not return the bicycle to him and that it was Moti Mohomed who told him that he had given the bicycle to the respondent. This Moti Mohomed not having been examined by the prosecution, the prosecution failed to connect the possession of the bicycle with the respondent. It was this bicycle which was alleged to be ridden on the night in question by the respondent and on the bar of which the bundle containing the liquor tubes was supposed to be carried. The prosecution thus failed to prove that the bicycle found on the spot, where it was alleged to have been thrown away, in fact belonged to the respondent or that it was borrowed by him.

7. The only witnesses from whom the prosecution could derive support was the police constable Abubakar Lalbhai and Inspector Pawar. Of these, Abubakar, the head constable, seems to have been examined as an Expert. He claims that he had undergone training in testing liquor by the Syke's test. He brought a Hydrometer as well as a thermometer to test the contents of the two sealed rubber bladders brought before the Court. After taking the necessary tests, he stated that the liquid contained in each of the two bladders was liquor containing 48.8 per cent of alcohol

and 51.2 per cent of water. The Inspector Pawar proved the prosecution case to the extent that he saw two persons riding a bicycle as he was about to get down from the police Jeep, the two persons got down, threw down the bicycle and took to their heels and ran towards the Maidan. He despatched two policemen to catch these two persons, but only one of them was actually caught in pursuit and that person was the respondent Madhukar. He claimed that he had seen the faces of both the persons who were riding the bicycle and, according to Pawar, the respondent Madhukar was riding the bicycle and the other accused was occupying the bar of that bicycle. It was Pawar's case that a bundle was attached to the handle of the bicycle, that it was wrapped in a Dhoti and that the bundle contained two rubber bladders in which about 8 gallons of liquor was alleged to be discovered. After holding a Panchanama he arrested the respondent. He thereafter charge-sheeted the two accused.

8. The learned Magistrate found no difficulty in acquitting both the accused. There was practically no evidence against the second accused, i.e., Khandu, who was not caught at the spot. As regards Madhukar also, i.e., the respondent, the learned Magistrate felt grave doubt whether he was really detected riding the bicycle which had the bundle alleged to be containing liquor in tubes. The learned Magistrate felt that the respondent could not be convicted on the sole testimony of the Police Inspector Pawar, especially because the witnesses who were called by the police were obviously get-up witnesses. In fact, the learned Magistrate came to the conclusion that there was an obvious attempt made by the police in this case to fabricate evidence in which they had failed. Giving benefit of doubt, the respondent was acquitted by the learned Magistrate.

9. It appears that the question whether the liquid found in the tubes was or was not liquor as deposed to by the police head constable Abubakar Lalbhai on the basis of the Hydrometer test, has not been specifically decided by the learned Magistrate.

10. In support of this appeal it is contended that the evidence of the Police Inspector Pawar should have been accepted as the respondent was caught running away, keeping the bicycle there, after he was detected riding the bicycle. I do not see any compelling reason to differ from the finding of the learned Magistrate, who had an opportunity to see the witnesses in the witness-box that it may be unsafe to convict the respondent on the sole testimony of the Police Inspector Pawar, in view of the circumstances of this case. But, in my opinion, there is a further infirmity in the prosecution evidence which goes to the root of the matter. There is no legal evidence, in my opinion, on which it could be held that the liquid, for the possession of which the respondent was charge-sheeted, is, in fact, established to be liquor or prohibited liquor by any legal evidence which can be accepted and acted upon. The testimony of Abubakar Lalbhai is brief and is to the following effect :

"I have undergone training in testing liquor by the Syke's test. I have brought to-day a Hydrometer and a thermometer to test the contents of the two sealed rubber bladders now before the Court. (Note : The seals on the two bladders are intact and they are removed in

the presence of the Court and the two accused and their pleader and the witness is asked to examine their contents). After taking the necessary tests I say that the liquid contained in each of the two rubber bladders is liquor containing 48.8 of alcohol and 51.2 per cent of water."

Relying on this testimony, it is urged by the learned Assistant Government Pleader that the Syke's Hydrometer test has been accepted as a reliable test to come to the conclusion whether a liquid claimed to be liquor is in fact liquor or not and, in view of the decisions of this Court, the evidence of the witness should be accepted. The witness claims to have undergone training in testing liquor. But what is the nature of that training is not testified by the witness at all. In fact, he has given no information to qualify as an Expert. Another serious infirmity in the testimony of this witness is that he has given no data from which he could come to the conclusion, even by applying the Hydrometer test, that the liquid was liquor. He has not stated what was the specific gravity of the liquid which he tested nor the temperature, nor has he disclosed the principle with reference to which he came to the conclusion that the liquid should be liquor.

11. The learned Counsel for the State relied upon the following decisions in support of his contention that the Hydrometer test should be accepted as a safe test to find whether a particular liquid is not liquor :

- (1) Criminal Appeal No. 1014 of 1961 D/-24-11-1961 (Bom) by a Division Bench of this Court.
- (2) Criminal Appeal No. 38 of 1962, D/-16-4-1962 (Bom), by a Single Bench of this Court.
- (3) Criminal Appeal No. 411 of 1957 D/-12-8-1957 (Bom) by a Division Bench of this Court.
- (4) Criminal Appeal No. 911 of 1961 D/-13-3-1962 (Bom) by a Single Bench of this Court.
- (5) Criminal Appeal No. 1646 of 1961, dated 5-3-1962 (Bom) by a Single Bench of this Court. I have had the benefit of most of these judgments produced before me. Criminal Appeal No. 1014 of 1961, was an appeal against the order of the Sessions Judge acquitting an accused of an offence under section 66 (b) of the Bombay Prohibition Act, as the learned Sessions Judge took the view that the Hydrometer test has not been approved. The learned Sessions Judge in that case referred to some decision in this Court, but neither Counsel appearing before the Division Bench were able to discover what that decision was. The learned Sessions Judge in the judgment under appeal had observed that there were many liquids which may have the same specific gravity as liquor and the Division Bench held that in coming to this conclusion the learned Sessions Judge had travelled beyond the record to which, according to the Division Bench, he should have confined himself; in other words, there was no evidence before the learned Sessions Judge in the judgment under appeal before this Division Bench to come to the conclusion that

there could be many liquids which may have the same specific gravity as liquor. But I do not find, on a careful scrutiny of the judgments that the Division Bench have come to the conclusion that the Hydrometer test is a reliable test to find out whether a liquid contains alcohol or not.

12. In another Division Bench decision, on which reliance is placed, viz., Criminal Appeal No. 411 of 1957, decided on 12th August 1957, which also was an appeal against the judgment of acquittal by the Sessions Judge, the Sessions Judge had observed in the course of his judgment that the Hydrometer test is a contrivance of determining the specific gravity, i.e., density of liquid and not for finding whether the liquid in fact contains any alcohol. It is observed : "Now, from the body of the judgment it does not appear wherefrom the learned Judge got this conception of a Hydrometer. It is possible that he might have got it from the Smaller Oxford Dictionary. But then if we turn to Webster's New International Dictionary, it would appear that Hydrometer means a floating instrument for determining specific gravities, especially of liquids, and thence the strength of spirituous liquors, saline solutions, etc. It is, therefore, not right for the learned Judge to minimize the importance of a Hydrometer test by merely saying that a Hydrometer is an instrument for testing nothing but specific gravity. Upon the authority of Webster's Dictionary, it would be clear that Hydrometer is an instrument for ascertaining the strength of spirituous liquors, saline solutions, etc., from a determination of the specific gravity of the said liquids....." Here again it seems the Division Bench took the view that there was no material before the Sessions Judge to decide on sufficiency of Hydrometer test.

13. The other three decisions quoted above are Single Bench decisions, which generally followed the view taken in Criminal Appeal No. 1014 of 1961.

14. I felt some difficulty in accepting the evidence of the police head constable as evidence of an Expert. It is not shown how he has qualified himself to be an Expert in testing liquors. But even assuming that by his experience he may have attained some degree of knowledge, the reason he has given, viz., the test carried out by Hydrometer and thermometer to determine whether the liquid was liquor or not, is certainly far from satisfactory. If it is known or proved that a certain liquid is liquor or contains alcohol, then it is certainly possible, by means of Syke's Hydrometer test and by use of thermometer, to determine the percentage of alcohol from that liquid; but if the basic question that has first to be proved is whether the liquid under test does or does not contain alcohol, it does not appear that Hydrometer test alone could be sufficient to come to any such conclusion. An opportunity was, therefore, given to the learned Assistant Government Pleader to call any expert in this subject who may have the necessary knowledge and experience in the matter of testing liquor or alcohol and liquids to find out whether Syke's Hydrometer test would furnish a necessary test for determining whether a liquid does or does not contain alcohol. Accordingly, the case was adjourned for recording the evidence of such an expert and was taken up to-day, when Shri Harbhajan Singh Mahal was examined by the State as an Expert. Shri Mahal entered the witness-box and has given his opinion regarding the Syke's Hydrometer test

and what can be determined by applying that test to a liquid. Sri Mahal is a Director of Forensic Science Laboratory and the Chemical Analyser to the Government of this State and, by his qualifications and experience, he seems to be a scientist of sufficiently wide knowledge and experience. He seems to have made a special study of estimation of alcohol in blood and contributed Papers in well-known American periodicals. He was specifically asked about the Syke's Hydrometer test and what conclusions can be drawn from such test. What he has stated, in his own words, is as follows :

"I know what is Syke's Hydrometer test. It is a test for determining the density of liquids. The test is made with the help of an instrument called Hydrometer. The instrument is allowed to be immersed in the liquid to be tested and is allowed to float. There are calibration marks on the stem of this instrument. These marks show the density of the particular liquid. When the Hydrometer is immersed in the liquid to be tested and the level of the liquid reaches a particular mark on the stem it will mean that the liquid is of that particular density, calibrated at the place upto which the liquid reaches the stem. There is a standard chart or table by reference to which the reading on the calibrated stem can be interpreted to find out the density of that liquid

If I am given a liquid and asked to test or find out its specific gravity by Hydrometer test and it is found that the specific gravity is between 1.0 and 0.7 it would not be possible to conclude from this much data alone that the liquid contains ethyl alcohol. This would be so even if readings were obtained at different temperatures."

To Court questions the witness has stated that a fairly reliable method to find out whether a liquid is ethyl alcohol or contains ethyl alcohol is by subjecting it to a chemical test and this test is known as idoform test.

15. In view of this clear and unequivocal testimony of the Expert witness, whose opinion one would always prefer to the opinion of Abubakar Lalbhai, who is a police head constable, claiming to have undergone training in testing liquor by the Syke's test, it is clear that the Syke's Hydrometer test will furnish no data to determine whether a particular liquid is liquor or contains alcohol. It may be that once it is known that a particular liquid contains alcohol, the percentage of alcohol in that liquid may be found by the Hydrometer test. But when the question to be determined is the primary question, namely, whether the liquid does or does not contain alcohol, the Hydrometer test does not appear to be the proper test to come to any such determination.

16. The learned Counsel for the respondent has relied upon certain other Single Bench decisions of this Court in which similar view has been taken. These decisions are :

- (1) Criminal Appeal No. 1854 of 1962, D/-26-8-1962 (Bom) by Shah J.
- (2) Criminal Appeal No. 36 of 1962, D/-24-7-1962 (Bom) by Chitale, J.
- (3) Criminal Appeal No. 57 of 1963, D/-12-7-1963 (Bom) by Shah, J., and

(4) Criminal Revn. Appln. No. 97 of 1961, D/-22-2-1961 (Bom) by Kotval, J. (Nagpur Bench). This last case is reported in 1962 Nag LJ as Note No. 26.

In view of the testimony of Dr. Mahal, who is the Director of Forensic Science Laboratory in this State, there is hardly any room for canvassing that the evidence of the police head constable as to the liquid being liquor could be accepted as legal or sufficient evidence to come to the conclusion that the liquid was liquor or prohibited liquor.

17. It is, however, urged that the circumstances in which the respondent was caught, the manner and the method of carrying the liquid which was out of the ordinary, viz., in rubber tubes, and the time of the night when the respondent was seen hurrying away with these contraband articles, are all circumstances which may well be taken into consideration in determining whether the liquid was not liquor. In my opinion, all these circumstances would raise a grave suspicion about the respondent, but none of these circumstances would be useful or reliable to determine whether the particular liquid which was carried was liquor or not. Though it is true that the usual modus operandi of transporting liquor clandestinely is found to be carrying it through rubber tubes, that fact alone can hardly be determinative of the crucial question, viz., whether the liquid is liquor or not. As opined by Dr. Mahal, the reliable test on which the Court of law can act would be the chemical test or the idoform test. Therefore, if the question is put in issue, the prosecution must prove beyond doubt that the liquid which was seized was liquor or prohibited liquor. In view of this conclusion, it is not possible to interfere with the finding of the learned Magistrate.

18. The result is the appeal fails and is dismissed.
Appeal dismissed.