
(1994) 07 BOM CK 0045
In the Bombay High Court
Case No : Criminal Appeal No. 378 of 1991

Abdul Jabbar

APPELLANT

Vs

The State of Maharashtra and Dist. Akola

RESPONDENT

Date of Decision : 11-07-1994

Acts Referred:

Essential Commodities Act, 1955 — Section 3, 7

Citation : (1996) 1 BomCR 498 : (1995) CriLJ 3446

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : M.S. Deshpande, for the Appellant; Kishore Pande, APP, for the Respondent

Judgement

1. Appellant herein challenges his conviction for an offence u/s 3 of the Essential Commodities Act and the sentence ordered by the Special Judge, Akola.
2. The prosecution story is that P.W. 2-Tiwari saw a truck parked on the by-pass near Washim Check-post. The truck was bearing registration No. MTV 2859. The said Shri Tiwari also found that there were some cans. He, therefore, got suspicious and asked the driver of the truck, who was no other but the appellant-accused, to open the fuel tank. He felt from the fuel tank that it emitted smell of kerosene and, therefore, the truck was brought to the Police Station through the truck driver and the same was handed over to the City Kotwali Police Station, Akola, where a complaint was filed which was treated as the First Information Report. In this report, the said witness Tiwari requested the police authority to obtain the sample from the fuel tank of the truck. It is significant to note that the name of the owner of the truck was given as Abdul Jabbar Abdul Sattar Musalman, resident of Bhandpura, Akola, Licence No. 39344. On the basis of this complaint, City Kotwali Police Station sprang into action and seized the truck. They, in presence of panchas, removed some 750 milliliters of contents of the fuel tank and sent the same to the Chemical Analyser. The Chemical Analyser's report confirmed that the sample was of diesel mixed with low boiling petroleum

hydrocarbons like kerosene. On this material, the appellant-accused, who was claimed to be the driver of the truck in the prosecution case, came to be charge-sheeted.

3. Before the Special Judge, who tried the accused, the defence of the accused was that he was not connected with the truck and he had nothing to do as such with what was inside the truck and, more particularly, the fuel tank.

4. In support of the prosecution case, three witnesses came to be examined, they being firstly the panch in whose presence sample was taken; secondly, Shri Tiwari, the Supply Inspector and, thirdly, the Investigating Officer. On the basis of this material, the trial Court came to the conclusion that it was the accused who was the driver of the truck and as such he used the kerosene for the purpose of driving the truck, and since this user was not permissible, he had committed an offence u/s 3 read with Sec. 7 of the Essential Commodities Act. Accordingly, the appellant-accused came to be convicted and sentenced, necessitating the present appeal.

5. Shri Deshpande, learned Counsel appearing on behalf of the appellant-accused, has taken me through the evidence extensively. According to him, it was not in the first place established that the appellant-accused was a driver. He also contended that it could not be established that the appellant-accused had used the said kerosene in contravention of the Kerosene (Restriction on Use) Order, 1966. According to him, this was not a case where the appellant-accused could be burdened with the criminal liability u/s 3 read with Section 7 of the Essential Commodities Act.

6. In order to see whether the offence is brought home by the prosecution, we will have to first examine the clause creating restriction. It is clause 3 of the Kerosene (Restriction on Use) Order, 1966. This Order has been promulgated by the Government of India under its powers u/s 3 of the Essential Commodities Act, 1955. Clause 3 of the said Order runs as under :-

"3. Restriction on use of Kerosene.- No person shall use or consume kerosene for any purpose other than cooking or illumination or both."

On basis of this, the prosecution contended that if it was the accused who drove the truck, the fuel tank of which contained the kerosene, then obviously he had used the kerosene for some purpose other than illumination or cooking and in that view of the matter, the prosecution contended, that the offence was brought home.

7. In order to appreciate the prosecution case, firstly, the charge will have to be seen. Para-5 of the charge is as under :-

"5. Offence Complained : That on or about 19-11-90 at about. 10.30 a.m. on Washim by-pass road at Akola you were found putting kerosene oil in the diesel tank on truck No. MTV 2059, which was driven by you. Kerosene being an essential commodity you have committed breach of Kerosene (Restriction on

Use) Control Order and thereby committed an offence under clause 3 punishable under clause 7 of the Essential Commodity Act."

What was, therefore, alleged against the accused was that he was found "putting kerosene oil in the fuel tank". Indeed, if the accused was found putting kerosene oil in the fuel tank, there was no question of his not knowing as to what commodity he was using while driving the truck. Let us, therefore, see whether this charge has been brought home.

8. In this behalf, the first information report (Exhibit 5) is worth seeing. The author, i.e., Shri R. H. Tiwari, the Supply Inspector, has merely stated in this Exhibit-5 that the truck was standing on the western side of the check-post. Thereafter, he contended in this complaint that when the party got the fuel tank of the said truck opened through the driver and smelt the diesel from the said diesel tank with the help of a rod, the party felt the smell of kerosene as if kerosene was mixed in it and, therefore, the truck was brought to the Police Station. At least, the first information report is wholly silent about the activity on the part of the appellant-accused in pouring the said kerosene in the fuel tank. Thereafter, we have the testimony of P.W. 2-Tiwari. In his evidence, Shri Tiwari merely stated that he saw the truck parked on the by-pass road and a person was repairing the truck. There were 2 to 3 cans near the truck. On his superior asking him to see what was going on, he went there and took the smell of the can which was of kerosene. Then, he took a rod, dipped it into the fuel tank and took the smell and got confirmed that it was smelling of kerosene. In his cross-examination, the officer does not anywhere state that he saw the accused pouring the kerosene oil in the fuel tank. It is very significant to note that the said mechanic who was working on the truck is neither interrogated nor examined by the prosecution. Further, there is no panchanama executed of that spot where the alleged cans were lying. The only can, which comes before the Court, is via a seizure panchanama (Exhibit-4) which speaks of the can smelling of kerosene, but it will have to be remembered that this seizure had been effected in the Police Station and the can came from the truck. Now, therefore, one thing is certain that the prosecution case about the accused pouring the kerosene in the fuel tank is at least not established. If that be so, could it be said that the accused, even if he is presumed to be a driver of the truck, knew about the contents of the truck ? Now, the panchanama itself will show that the investigating agency was aware of the fact that it was not the accused who was the owner of the truck. The case of the prosecution is indeed that the accused was merely a driver of the truck. If he was a driver, then he would obviously not have any connection with the fuel thereof, as his duty was not to purchase the fuel for the truck. However, the fact remains that the accused has no anywhere suggested all this to the Investigating Officer, or to the said Inspector, Shri Tiwari.

9. If the appellant-accused was merely a driver of the truck, though he denied to be so, can it be inferred or presumed that he had the perfect idea that he was having kerosene in the fuel tank of the truck ? The answer to this question will

obviously have to be given in the negative. Now, unless the investigating agency had recorded the statement of the owner of the truck, whose whereabouts they knew, or unless it was established that it was the accused who had filled in the said fuel tank of the truck with kerosene, the offence could not have been brought home. In this behalf, from the language of clause 3 of the Kerosene (Restriction on Use) Order, 1966, it is certain that the user by any person or consumption would involve the knowledge and a volition on the part of the concerned person to use kerosene. The words "use of consume kerosene" would be meaningless, if the concerned Person did not have the knowledge of the commodity which was being used. The prosecution, under such circumstances, was duty bound to establish this knowledge on the part of the accused, and by his merely being a driver, by establishing that the fuel tank did contain kerosene, such knowledge, I am afraid, could not be established. There has to be a connection established in between the knowledge of the fact that kerosene was being used in the fuel tank and, for that purpose, some more efforts were bound to be taken by the investigating agency and as has already been indicated, that could have been achieved by examining the mechanic who was working, who could have seen or who probably had seen the accused pouring kerosene in the fuel tank. Similarly, the statement of the owner could have been recorded so as to establish that it was the accused who had filled in the fuel tank. In the absence of this material, it will be difficult to hold, merely on the basis of existence of kerosene in the fuel tank, that the accused, who even after he is held as a driver, did know that what was in the fuel tank was diesel mixed with kerosene.

10. Imagine a situation where a driver in all solemnity fills in the diesel from a petrol-pump where itself there is a mixture of kerosene with the diesel. Now, unless the investigating agency had established the percentage of the diesel in the said sample, I am afraid, it would itself be difficult for it to establish that the offence under the clause was committed. Where merely on the existence of the kerosene in the fuel tank the offence is sought to be established, then the investigating agency will have also to rule aside a possibility of the original diesel having been mixed with the kerosene oil. Unless that is done, the driver of the truck, who obviously has no duty to fill up the fuel tank, cannot be looked under the section.

11. The learned trial Court has merely held on the basis of the fact that the appellant-accused was a driver of the truck, that he was using the kerosene for the purposes other than cooking or illumination. As has already been pointed out, the terminology itself insists that under such circumstances, the accused must have the knowledge, firstly, that what he was using was kerosene. Such charge could have been brought home by anybody who had seen the accused putting or pouring the kerosene in the fuel tank, because in that eventuality, it would not have been possible for the accused to say that he was pouring the kerosene for some other purpose or for some lawful purpose. In the absence of that, however, it will be difficult to clothe the accused with the criminal liability.

The trial Court has not considered all these aspects. Here, the trial Court chose to go on the apathy on the part of the accused and the apathy on the part of the defence to give proper suggestions by cross-examination. It has to be borne in mind that the prosecution has to stand on its own legs in a criminal trial. The accused may choose to keep quiet all through. However, the prosecution has to establish its case beyond any reasonable doubt. I am afraid, the missing link in this case has not been completed by the prosecution. The appellant-accused will, therefore, be entitled to the benefit of doubt and his appeal will have to be allowed. Hence, the following order is passed :-

The appeal is allowed. The order of conviction and sentence of the appellant-accused passed by the trial Court is set aside. The appellant-accused is ordered to be acquitted of all the charges. His bail bonds shall stand cancelled.

12. Appeal allowed.