

(1978) 06 BOM CK 0021

In the Bombay High Court

Case No : Criminal Revision Application No. 376 of 1977

Biru Nana Kolekar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 19-06-1978

Acts Referred:

Bombay Prohibition Act, 1949 — Section 13, 24A, 59A, 66, 6A

Citation : (1978) 80 BOMLR 482

Hon'ble Judges : Jahagirdar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Jahagirdar, J.—His Lordship, after stating the facts of the case and dealing with points not relevant to this report, proceeded. In support of his defence that he had consumed medicinal preparation which resulted in high alcoholic level in the blood, the accused gave an explanation that he had consumed a medicine called "Aminovin" which had been prescribed by his doctor for his stomach trouble. The doctor also was examined by the accused and he had deposed that he had in fact recommended this medicine for the accused on account of his stomach trouble. Mr. Rane suggested that the medicinal preparation consumed by the accused was covered by Section 24A of the Act and, therefore, he has discharged the burden which was placed upon him by Sub-section (2) of Section 66. With the end of showing this Mr. Rane referred to Section 6A of the Act. Sub-sections (1) to (6) of the said section provide for the manner in which the State Government may determine whether any medicinal or toilet preparation, amongst other, containing an article is fit for use as intoxicating liquor. Sub-section (7) of Section 6A says that until the State Government has determined as aforesaid any article mentioned in Sub-section (1) to be fit for use as intoxicating liquor, every such article shall be deemed to be unfit for such use. Section 24A provides that nothing in this Chapter, i.e. chapter III, of the Prohibition Act shall be deemed to apply to, among others, any medicinal preparation containing alcohol which is

unfit for use as intoxicating liquor.

2. Mr. Rane's argument was that the prosecution has not shown whether u/s 6A Aminovin has been, declared as an article fit for use as intoxicating liquor. If this is so, says Mr. Rane, the presumption under Sub-section (7) shall apply and the Aminovin shall be regarded as deemed to be unfit as an intoxicant within the meaning of Clause (2) of Section 24A. According to Mr. Rane, since Aminovin has not been declared as fit for use as intoxicating liquor and it is shown to have been consumed by the accused in the instant case, Section 24A makes Section 13 of the Act inapplicable and. therefore, no offence is committed punishable u/s 66(1)(b) of the Act.

3. There is an inherent fallacy in the argument advanced by Mr. Rane. Mr. Rane read only a part of Section 24A. If the entire Section 24A is read properly, it is crystal clear that the accused has failed to discharge the burden which has been placed upon him by Sub-section (2) of Section 66. Though it is true that the prosecution has failed to prove that Aminovin is an article which is fit for use as intoxicating liquor and the presumption of Sub-section (7) of Section 6A is available to the accused, viz., that Aminovin is unfit for use as intoxicating liquor, the burden still remains to be discharged by the accused, because the proviso to Section 24A says that Section 13, among other things, in chap. III shall not apply to an article containing alcohol which is unfit for use as intoxicating liquor only if such article corresponds with the description and limitations mentioned in Section 59A of the Act. It might at best be said that the accused has only shown that he had consumed a medicinal preparation containing alcohol which is unfit for use as intoxicating liquor, but he has totally failed to prove that the medicinal preparation which he consumed corresponded with the description and limitations mentioned in Section 59A of the Prohibition Act.

4. Section 59A prohibits a manufacturer of an article mentioned in Section 24A from using alcohol in the manufacture of that article in quantity greater than what is necessary for the extraction or solution of the elements contained therein and for the preservation of the articles. It further provides that the case of manufacture of an article mentioned in Section 24A in which the alcohol is generated by a process of fermentation the amount of such alcohol shall not exceed 12 per cent, by volume. Aminovin alleged to have been consumed by the accused contains 20 per cent, of alcohol. It has not been shown by the accused that the alcohol to the extent of 20 per cent, of volume contained in the medicine alleged to have been consumed by him was not generated by the process of fermentation of alcohol, nor has it been shown by him that this alcohol if it is added by manufacturer is necessary for the extraction or solution of the contents therein and for the preservation of the article. Though, therefore, it could be contended on behalf of the accused that he consumed medicinal preparation which was unfit for being used as an intoxicant, he cannot be allowed to contend that he consumed something which was permitted by the Act. The burden of proving that he consumed an article permitted by the Act or he consumed an

article, consumption of which was not prohibited by the Act has not been discharged by him.

5. Mr. Rane made a somewhat vain attempt to establish that the burden of proof placed upon the accused by Sub-section (2) of Section 66 has been discharged by placing reliance upon a judgment of this Court in *State v. Bhausa*.¹ That case related to a medicinal preparation called "Angurasava" and it was not shown by the prosecution in that case that that medicinal preparation was not covered by Section 24A of the Prohibition Act. This Court held that the burden of proving in a case of seizure that the article which was seized was one which was not covered by Section 24A of the Act was on the prosecution. Mr. Rane sought to seek support from this decision for his proposition that even in this case the burden of proving that the medicinal preparation consumed by the accused was not covered by Section 24A was upon the prosecution and this burden has not been discharged by the prosecution. The burden which rests upon the prosecution and which rests upon the accused are totally different in cases under the Prohibition Act where the case is one for possession and the case is one for consumption. In a prosecution for consumption, where it is shown that the blood of the accused contained more than 0.05 per cent, w/v of alcohol, then the burden of proof that he consumed a preparation consumption of which was not prohibited by the Act is entirely upon the accused. It is not enough for him to say that he consumed medicinal preparation; he must further show that he consumed a medicinal preparation, consumption of which is not prohibited by the provisions of the Prohibition Act.

6. In *State v. Vijaysingh* (1961) 64 Bom. L.R. 303, it was held by a single Judge of this Court that it could not be accepted as a valid defence to a prosecution for being intoxicated u/s 66(1)(b) that the moment the accused person shows that he has taken a medicinal preparation containing high percentage of alcohol, he has discharged the burden u/s 66(2) of the Prohibition Act. The following sentences may with profit be noted (p. 52):

...The accused is certainly entitled to prove it by bringing material on record in the examination of the witnesses called for the prosecution or documents seized by the prosecution or by independent evidence on his own, but the responsibility of introducing the evidence regarding these facts is certainly cast on the accused by the Legislature in enacting Sub-section (2) of Section 66 of the Act. It is in this sense that the provisional presumption arising in favour of the prosecution can be said to be displaced if the accused introduces facts showing that what he consumed was a medicinal preparation, and further that the medicinal preparation was of the kind permitted by the Act, rules and regulations made thereunder. The presumption that Sub-section (2) of Section 66 draws from the presence of a certain percentage of alcohol concentration in the blood of the accused charged of having consumed prohibited liquor is a compelling presumption. This presumption is liable to be rebutted by showing that what was consumed was not only a medicine but a medicinal preparation permitted under

the Act or its rules or regulations. It would not, therefore, be a correct-proposition to say that the burden which is to be borne by the accused when prosecuted u/s 66(1)(b) is discharged the moment the accused states or establishes even as a reasonable probability that he had consumed medicinal preparation which had an intoxicating effect.

7. This decision has been confirmed by the Supreme Court in *Vijay Singh v. State* (1965) 68 Bom. L.R. 98 S.C.

8. It is no answer to this legal position to say, as Mr. Rane has sought to say, that the medicinal preparation consumed by the accused was manufactured outside the State of Maharashtra and, therefore, Section 59A did not apply to the manufacture of the said medicine. Section 59A indeed will not apply to a manufacturer situated outside the State of Maharashtra, but Section 24A must apply to every person within the territory of Maharashtra. Section 24A provides that Section 13, among other provisions, will not apply to a medicinal preparation which satisfies the requirements mentioned in Section 24A read with Section 59A. If an accused pleads that the alcohol in his blood contained a level of 0.05 per cent, because of the consumption of medicine manufactured outside the State of Maharashtra, he would still be guilty unless he is able to prove that the manufacture of the alcohol by manufacturer even outside the State of Maharashtra complied with the requirements of Section 59A. The consumption of liquor and other articles prohibited by the Prohibition Act will be governed by the provisions of the Act and will not be permitted merely because a particular article is manufactured outside the State of Maharashtra and is consumed within the State of Maharashtra. It is patent that the accused in the instant case has miserably failed to prove that the medicinal preparation which he says he had consumed was prepared in compliance with the provisions contained in Section 59A of the Act.

9. It may further be noted that the story of the accused that he consumed Aminovin which itself caused a high rise in the blood has been rejected by the two Courts below. Dr. Limaye who was examined on behalf of the prosecution was unable to say whether the consumption of Aminovin in large quantity in which the accused is alleged to have consumed, the same could cause the alcohol level in the blood of the accused. Dr. Vanarase whose brother runs a Chemist's shop from whom the accused is said to have purchased the medicine, is not an expert to give any opinion about the probable percentage of the alcohol, but nevertheless was rash enough to say that he has approximately stated that 300 milliliter would give rise to alcohol percentage as 0.095 per cent. w/v of alcohol. Dr. Vanarase's testimony is wholly inadequate to discharge the burden placed upon the accused by Sub-section (2) of Section 66. The learned Sessions Judge, therefore, rightly doubted the story of the accused that he had consumed Aminovin which caused the excessive alcohol contained in his blood.

10. Mr. Rane then sought to destroy the prosecution case by contending that the prosecution has not in the instant case established mens rea on the part of the

accused. I do not see that the question of mens rea arises at all when the burden of proof that he had consumed a preparation, consumption of which is not prohibited by the Act, has not been discharged by the accused. It is not necessary to decide whether mens rea is an essential ingredient of the offence under the Prohibition Act, but where the statutory burden is placed upon the accused, it is upon him to discharge that burden including the absence of mens rea.

11. In the result, this petition must fail. Rule is discharged.