

(2012) 02 MAD CK 0252
In the Madras High Court
Case No : Criminal A. No. 726 of 2006

Elumalai

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 428
Madras Prohibition Act, 1937 — Section 4(1)(aaa), 4(1)(i), 4(1A)(ii)

Citation : (2012) MLJ(Cri) 660

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : Vinod Kumar for N. Manokaran, for the Appellant; C. Balasubramanian, Additional Public Prosecutor, for the Respondent

Judgement

S. Palanivelu, J.—The appeal is preferred against the conviction of the appellant u/s 4(1)(i), 4(1)(aaa) and 4(1-A)(ii) of Tamil Nadu Prohibition Act and sentenced him to undergo rigorous imprisonment for two months and to pay a fine of Rs. 500/- in default to undergo simple imprisonment for one week for the offence u/s 4(1)(i) of TNP Act; to undergo two years R.I. and to pay a fine of Rs. 2,000/- in default to undergo R.I. for four months and sentenced to undergo R.I. for four years and to pay a fine of Rs. 4,000/- in default to undergo R.I. for one year by the learned Principal District and Sessions Judge, Namakkal, in S.C. No. 64 of 2006 dated 27.7.2006. The sentences were ordered to run concurrently and the detention period of the appellant was ordered to set off u/s 428 of Cr.P.C. P.W.1 lodged complaint Exhibit P-1 with respondent police stating that he is a flower vendor, that he used to consume liquor, that on 13.11.2005, he went to Athipazhaganur village and after selling flowers, he enquired who was selling liquor and knew that the accused was selling the liquor and he proceeded there. He saw the accused keeping two lorry tubes with the capacity of 60 litres in which he was having 55 litres each and pouring liquor in a 5 litre white colour can from the tube. P.W.1 asked him to give liquor for Rs. 10/-. He received the amount and gave one glass of liquor. The liquor was in a strange colour. On

enquiry, the accused told that was special arrack that would give more kick. P.W.1 consumed it. He asked his name for which the accused told that his name is Elumalai, he is residing near Mariamman Temple at Kutladampatti village and he used to sell the liquor in the same place every day at 6.00 a.m. to 11.00 p.m. P.W.1 felt irritation in his stomach and eyes and he immediately came back to his house at 7.00 a.m. P.W.2, wife of P.W.1 asked him to take food. He vomitted. At about 9.30 a.m. he came to consciousness. His wife told him that he vomitted for three times and she gave plantain bark juice bar juice. P.W.1 on earlier occasions did not experience this type of unconscious. He suspected that the liquor sold by the accused would have some poisonous substance. He again felt irritation on his stomach and eyes. His wife took him to Rasipuram Govt. Hospital. Before going there he went to Rasipuram Police Station, narrated the incidents and lodged complaint Exhibit P-1.

2. On receipt of complaint, the Sub-Inspector of Police registered a case in Cr. No. 1372 of 2005 and lodged F.I.R. Exhibit P-13. P.W.7 Inspector of Police received the case file and proceeded with the investigation. He sent the complainant for medical treatment. P.W.3 doctor attached to Rasipuram Government Hospital examined and treated P.W.1 and issued Ex.P.4 Certificate of Drunkenness, in which he has stated that on examination, in the breath, smell of P.W.1 Alcohol was present, eyes congested, pupils were normal. Walk and speech were also normal. He examined the throat of P.W.1. Even though P.W.1 had consumed liquor he was not under its influence. P.W.1 refused to give blood and urine samples for examination to find out presence of liquor, for which the doctor got Exhibit P-3 signature from P.W.1.

3. P.W.7 proceeded to the place where the accused sold the liquor and arrested him. He recorded the confession statement voluntarily given by him in the presence of witnesses. Exhibit P-14 is the arrest card. He also took the samples of liquor which the accused was selling. He also seized Rs. 30/- from the accused under cover Mahazar.

4. After taking the samples, he destroyed the liquor by pouring it on the earth. It is evident from Exhibit P-6. He also seized empty white colour plastic can, two lorry tubes and a glass tumbler. He came to the police station with the seized properties and accused. He deputed Head Constable P.W.6 to take the liquor for chemical analysis. P.W.5 the Record Keeper of Judicial Magistrate's Court, Rasipuram, says about the receipt of the requisition from the investigating officer and despatched all the samples to the forensic science lab, Salem. Exhibit P-11 is the report from the Forensic Science Laboratory with the opinion that the sample liquor contained 6.9 mg of Atropine out of 100 mg. P.W.7 also examined the scientist as well as the doctor and other witnesses and recorded their statements. On completion of investigation, the investigating officer laid charge sheet against the accused.

5. The accused was put on trial. In order to establish the case, the prosecution examined P.Ws.1 to 7; marked Exhibits P-1 to P-14. and M.Os. 1 to 6. After the

examination of prosecution witnesses, the accused was questioned u/s 313 Cr.P.C. with regard to the incriminating circumstances for which he denied the complicity. Two witnesses (D.Ws.1 and 2) were examined on the side of accused. He has no document on his side. The Trial Court, after analyzing the evidence on record, convicted and handed down the sentences on the appellant/accused as stated above.

6. Point for consideration :

The point for consideration in this appeal is, "whether the prosecution has established the charges framed against the accused beyond all reasonable doubt?"

Point :

7. The learned counsel for the appellant Mr. Vinod kumar appearing on behalf of Mr. N. Manoharan would contend that the improbabilities in the case are weakening the prosecution case, that the refusal on the part of the P.W.1 to give urine and blood sample would indicate that he has not consumed any liquor, that how P.W.1 was able to say the exact quantity of the liquor possessed by the accused and the prosecution case is a bundle of so many discrepancies and improbabilities and hence the benefit of doubt may be extended to the appellant.

8. The learned Additional Public Prosecutor Mr. C. Balasubramanian would submit that the recovery of the sample and the Chemical examination of the same have been duly established and the liquor sold by the appellant is found to have contained 6.9 mg of Atropine and the prosecution has brought home the guilt of the appellant beyond all reasonable doubts and hence there is no ground made out to dislodge the findings of the trial Court.

9. In the complaint, P.W.1 has stated the exact quantity of the liquor possessed by the appellant in two lorry tubes as 55 litres on each tube which is improbable. Because he might have known that the appellant was serving the liquor and it is not believable that he could point out the exact quantity of the liquor that the appellant possessed.

10. The very important point to be noted in this case is that the refusal on the part of P.W.1 to give samples of his urine and blood. Only if the urine and blood were examined, it could be ascertained whether the individual has consumed liquor or not. It is true that the liquor which was sent for analysis contained Atropine. But the recovery has to be established. It is in the evidence of the doctor that the breath contains alcohol smell, eyes congested, pupils are normal and the walk and speech were also normal. It is the evidence of P.W.2, wife of P.W.1 that it, is true to state that her husband would always be in a intoxicated condition. In such situation at the time of examination of the doctor, the breath of P.W.1 could have been with alcohol smell. The pupils, walk and speech were normal. It is also stated by the learned counsel for the appellant that even though P.W.1 consumed liquor he was not in its influence. As far as the condition

of the eyes is concerned, it could be caused by so many factors. For example if a person was sleepless on the earlier night, the eyes could be seen congested.

11. In this context, the learned counsel for the appellant draws attention of the Court to a citation in Rathinam, In re. 1980 L.W. (CrI) 273 in which it is held that failure to perform other tests, viz., examination of blood and urine for the presence of alcohol, the benefit of doubt would be given to the accused. Following is the observations of this Court:

The only symptoms other than the smell of the arrack found by the doctor was the congestion of the eyes of the accused (revision petitioners) the cause of which can be attributed to the awakening of the revision petitioners at night. The doctor has also stated that fermented sugarcane juice, if taken, may emanate the smell of arrack in breath. Therefore, from the mere circumstance of smell alone, the inference that the accused has consumed arrack cannot be drawn. The other tests, viz., the examination of blood and urine for the presence of the alcohol have not been done. This is eminently a fit case where the benefit of doubt has to be accorded to the accused.

12. I am in respectful agreement with the above said opinion. When the blood and urine of the individual were not subjected to examination for ascertaining the presence of alcohol, it would not be safe to convict the accused. The other indications which are to be exposed by the influence of alcohol were not seen in P.W.1. Since the fact of presence of alcohol has not been made known by the prosecution, it could not be concluded that he consumed liquor sold by the appellant. The other circumstances would show that the recovery has not also been properly proved. In these circumstances, I am of the considered opinion that convicting the appellant on the ground of possession and selling the poisonous liquor is not sustainable. In such a view of the matter the judgment and conviction passed by the Court below has to be set aside and it is accordingly set aside. The appellant is entitled for the benefit of doubt. I answer this point accordingly. In fine, the criminal appeal is allowed acquitting the appellant of the charges framed against him. The disposal of the material objects shall be in accordance with the directions of the trial Court. The bail bond executed by the appellant shall stand cancelled forthwith.. The fine amount, if any paid by the appellant shall be refunded to him.