

(1991) 03 BOM CK 0041

In the Bombay High Court

Case No : Criminal Appeal No. 488 of 1983

Kanhaylal Kundanmal Oswal

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 14-03-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 12, 374
Essential Commodities Act, 1955 — Section 14, 3, 4, 7, 9

Citation : (1991) 3 BomCR 472 : (1992) CriLJ 1039

Hon'ble Judges : D.J. Moharir, J

Bench : Single Bench

Advocate : R.G. Ketkar, for the Appellant; S.S. Keluskar, Assistant Public Prosecutor, for the Respondent

Judgement

1. This is an appeal u/s 12 read with Section 374 of the Criminal Procedure Code. The appellant accused challenges his conviction u/s 7 of the Essential Commodities Act, 1955. The offence which he is held to have committed are for contravention of the provisions of Section 3 of the Act, read with the provisions of Clauses 6 and 10 of the Maharashtra Scheduled Commodities Retail Dealers' Licensing Order, 1979 (hereinafter referred to as the said Order) and further read with the terms or conditions Nos. 3, 4 and 6 of a licence issued to him as a retailer in kerosene. The appellant Kanhaylal Kundanmal Oswal obtained a retail dealer's licence under the order and this licence expired on 31st of December, 1982. On 18-1-1983 the accused made an application to the concerned authority for a renewal of this licence. The order renewing the licence was passed on 2-5-1983.

2. For the period between 31-12-1982 and 2-5-1983, the appellant accused had continued to conduct his business as a retail dealer in kerosene.

3. The prosecution case is that the District Supply Officer under the Collectorate, Pune had been received complaints from several quarters within the Pune Food distribution areas, that there was a serious shortage of kerosene and the card

holders were not being supplied kerosene on their cards. Therefore, the Supply Inspector Ulhas Sahadeorao Kadre PW-1 along with his superior the Zonal Officer one Vajrani decided to carry out inspection of the shops of the retail dealers in kerosene. On 23-3-1983, they therefore visited the shop of the accused in the Shivajinagar locality. The accused was present in his shop. A demand for production - for the purpose of inspection - of the stock register and the receipt book was made and these were accordingly produced by the accused. Upon inspection of the stock register and the account books pertaining to the purchase and sale of kerosene it was found that the stock of kerosene with the accused in his shop ought to have been 545 liters whereas it was actually found to be 468 liters. That is, there was a shortage of 77 liters of kerosene in the stock. Secondly, on inspection of the receipt books produced by the accused, it was also found that instead of selling kerosene at the rate fixed by the Collector of Pune, Rs. 1.77 paise per liter the accused had sold kerosene at the rate of Rs. 1.91 paise per liter.

4. As such, the accused was alleged to have committed breach of the terms and conditions Nos. 3, 4 and 6 of the retail dealer's licence issued to him under the Order and also of the clauses Nos. 6 and 10 of the Order itself. These contraventions, it was contended, were offences punishable under S. 3 read with S. 7 of the Essential Commodities Act, 1955. The charge which was framed against the accused as per Exhibit 12 upon these allegations of facts was that he had in the first instance failed to maintain a true and correct account and the prescribed registers also, that he was found to be short by 77 liters of kerosene in his stock and lastly that instead of selling kerosene at the rate of Rs. 1.77 paise per liter as the fixed rate, he was found to have indulged in selling the same at the rate of Rs. 1.91 paise per liter.

5. To the charge so framed, the accused pleaded not guilty. In particular and with reference to the charge of selling kerosene at a rate in excess of the fixed rate, he raised a contention that there had been a publication of the rates fixed by the Collector in the newspapers at Pune. That under the public notice given by the Collector as it is called, the rate for selling kerosene had been increased to Rs. 1.91 paise per litre. It was, therefore, that he had stated selling kerosene at that rate. As such, he had not committed any offence. In regard to the other contraventions with which he was charged, he merely appears to make a denial simpliciter.

6. The learned Special Judge having considered the evidence of the complainant Supply Inspector Kadre and panchas and having given his due attention to the terms and conditions on which he was permitted to carry on business as a retail dealer in kerosene, as per the provisions of the Order of 1979, held that the accused was proved to have committed the offences as he was charged with. The accused was, therefore, convicted under S. 3 read with S. 9 (Sic) of the Essential Commodities Act and was awarded by way of punishment a term of three months of rigorous imprisonment and the fine of Rs. 500/-, in default, of payment of

fine, he was also directed to undergo further rigorous imprisonment for one more month. It is this conviction and sentence as awarded to which exception is taken by this appeal.

7. Learned Counsel for the appellant had submitted in the first instance that the conviction so far as the sale of kerosene at Rs. 1.91 paise per liter is concerned, the trial Court erred in holding that at the material time the rate for the sale of kerosene was Rs. 1.77 paise per liter. In this behalf, the evidence of the complainant shows that the rate of Rs. 1.77 paise per liter for sale of kerosene by retail dealers had been fixed by the Collector as per his public notice Exhibit 19. The date of this public notice is not available. However, the public notice itself provided that the rate of Rs. 1.77 paise per liter would be enforceable with the effect from 15-2-1983. The prosecution case is that this being the rate of sale of kerosene with effect from 15-2-1983, at the date 23-3-1983 when his shop was inspected, he ought to have been found selling the kerosene only at that rate and no more. However, what was found from the receipt books at 17 and 18 as per receipt Nos. 511 to 516 was that kerosene has been sold at the rate of Rs. 1.91 paise per liter. Obviously this was charging a rate in excess of the rate which was fixed for being operative from 15-2-1983 onwards. Quite apparently, therefore, the contravention of the terms and conditions No. 6(3)(b) of the licence Exhibit 15 would appear to be there. The trial Court's conclusion to this effect is challenged by learned counsel Shri Ketkar on two grounds. According to him, the provisions of the terms and condition No. 6(3)(b) would not be applicable and attracted at all. He points it out that under the term No. 6(3)(a) and (b) both, what is referred to as essential is the fixing or not fixing of a margin of profits. A licensee is not to charge, in respect of the sale of commodities made by him a margin of profit, as per sub-clause (a) in excess of a margin as profit if fixed by the Government under the Essential Commodities Act or under the Defence of India Rules. There is no such margin of profit fixed which position is of course not disputed also by the learned Additional Public Prosecutor. The licensee is also not to be charged, in respect of the sale of commodities made by him, as a margin of profit where it is not so fixed, in excess of the rate prevailing in the local market at the time of the sale. Therefore, according to Shri Ketkar, on the admitted premise that the margin of profit had not been fixed what ought to have been proved against the accused was selling of kerosene at a rate in excess of the rate prevailing in the local market at the material time. This submission is entirely erroneous because it overlooks the further provision in the term 6(3)(b) that the licensee is not to charge a rate, for sale of kerosene which is in excess of any maximum fixed for retail transactions, fixed either by the State Government or by the Central Government for the locality, district or State as whole. Exhibit 15 as the public notice applicable to the Pune distribution area clearly provides a fixed rate of sale of kerosene. The rate is Rs. 1.77 paise per litre. Therefore, the contravention of the term or condition No. 6(3)(b) of the licence would clearly be there.

8. However, the second submission of learned Counsel which is founded on a

very interesting issue of fact is this : The defence taken by the accused was that subsequent to the public notice Exhibit 15 dated 15-2-1983, the authorities concerned had issued yet another public notice whereunder the rate for sale of kerosene by the retail dealer had come to be fixed at the rate of Rs. 1.91 paise per litre and that this notice had also come to be published in the newspapers. The fact that it was so published is not disputed by the complainant Kadre PW-1 himself. Asked as to whether or not the rate for sale of kerosene has not come to be so declared in the newspapers, he replied in the affirmative but hastened to offer an explanation that even so the district supply office though not authorised the retail dealer to sale kerosene at that rate and further explained that until such authorisation to the retail dealer was issued, he was not entitled to sell kerosene at the rate of Rs. 1.91 paise per litre. As to how the authorisation would then take place is explained by him. He states that instructions are given to the retailers as regards the rates, through or in information books which are to be maintained by them in prescribed form. These instructions books are described as Suchana-Vahi. Until an instruction or direction to proceed to sell kerosene at the increased rate is published in the newspaper, would be given, he would not have been entitled to sell kerosene at the increased rate of 1.91 paise per litre. He was, therefore, asked whether or not such an instruction books was actually found and seized at the time of the inspection. To that the witness replied that the instruction book was not found with the accused and, therefore, it could not be seized. This statement, learned Counsel Shri Ketkar submits, is definitely incorrect if not to be found and described as false. For the draws the attention of the Court to the statement of the accused which was recorded immediately after the raid. In the last para of this statement the accused is found to have stated :

"On being asked by Supply Inspector No. 1 and the Zonal Officer "C" Zone I have produced one stock book two receipt books, one of controlled rate of Re. 1.77 ps. and one of increased rate of Rs. 3-10 ps. and one book of instructions."

The witness was asked, therefore, as to whether he had recorded the statement of the accused correctly. His answer was that the statement Exhibit 21 recorded by him was as per the actual statement made by the accused, that it was signed by the accused and himself and that the contents thereof Exhibit 21, had been correctly recorded. It would, therefore, be a matter of doubt for placing reliance upon the answer given by the witness now, that the instruction book was not found with the accused or that it could therefore be seized. It would, therefore, be reasonable enough, for the learned Counsel for the appellant to argue that the instruction book, if really one was required to be maintained had in fact come to be seized by the complainant and further that it was not relied upon by the prosecution for the reason that it did not contain instruction in regard to the go ahead signal given by the authority for selling kerosene at the rate of Rs. 1.91 paise per litre. Upon that, according to the learned Counsel for the appellant, an adverse inference needs to be drawn against the prosecution, for non-production of the instruction book.

9. The third submission of learned Counsel Shri Ketkar however appears to be even more fundamental. Condition No. 3 of the licence at Exhibit 15 reads, to the extent it is relevant here as under :

"3. (i) The licensee shall, except when specially exempted by the State Government or by the licensing authority in this behalf maintain a register of daily accounts for each of the commodities mentioned in paragraph (i), (which includes kerosene).

This condition thereafter refers to the maintenance of the register of daily account. The daily account is to show the opening stock on each day, the quantities received on that particular day with certain other particulars, also the quantities of Kerosene delivered or otherwise removed from the shop on the day and all this is required to be done at the end of the day to which the entry relates. In all, as many as 14 terms and conditions are imposed upon the licensee. There is, therefore, no reference made whatsoever to the maintenance of any such register or book called instructions book or Suchana-Vahi. In the absence of any reference to any instructions book in the terms and conditions imposed under the licence, it would be a still graver burden on the prosecution to establish that the instructions book was required to be otherwise also maintained either under the provisions of the Order of 1979 or under the provisions of the Essential Commodities Act itself. It has, therefore, to be and is conceded by the learned Additional Public Prosecutor that the prosecution is not in a position to show how the maintenance of any such register would be essential part of observance of licence and conducting business as a retail dealer. If, broadly speaking, there is no legal obligation on the part of the appellant accused to maintain such an instruction book, then the explanation offered by the complainant that the accused would not be in a position to sell kerosene at the increased rate of 1.91 paise per litre in spite of the fact that the rate to be charged had come to be fixed and published in a newspaper would be untenable. It is, therefore, on facts that it would not be possible to hold that the accused was not entitled to sell kerosene at the increased rate of Rs. 1.91 paise per litre. The explanation was offered by the accused would, therefore, in view of the admission of the particular fact, suffice under S. 14 of the Act which would lay the burden of proof on him to justify the sale at Rs. 1.91 per litre. That there did exist and he did have authority to sell kerosene at the rate of 1.91 per litre since that as the rate published, was a fact admitted by the complainant himself. To this extent, therefore, the conviction of the appellant would be bad in law and hence unsustainable.

10. If the account books maintained by the accused are contended as being incorrectly maintained; then, they would not be so allowed to be styled as incorrectly, irregularly or improperly maintained to the extent that the entries therein would be with reference to Rs. 1.91 paise per liter as the rate fixed for sale of kerosene on retail.

11. However, it is also the prosecution case that on an inspection of the stock of

kerosene in the shop on that day, 26 sealed and unopened tins of kerosene each of which apparently contains 18 litres of the fluid were found in the shop. Therefore that came to 468 litres. Actually, as per the position of the stock received upto the date of the inspection and as per the sales of kerosene effected up to that date in terms of litres, should have been 545 litres in all. Therefore, according to the complainant, there was short stock of 77 litres. This position, the accused also appears to have unequivocally admitted in his statement Exhibit 21. However, at the stage of the trial a different contention appears to have been raised. It was suggested to the complainant as also to the panch witness Lakhamichand Jain PW-2 that not 26 but actually 30 tins of kerosene were found in the shop. The suggestion, therefore, is that the stock of kerosene in the shop at that time was therefore 540 litres. Apart from the fact that both these witnesses have emphatically denied having seen the number of sealed and unutilised tins as being 30. They have asserted that it was only 26, the learned Judge of the trial Court has also made an observation that even assuming that the stock of kerosene was 540 litres in 30 tins as suggested by the accused, as per his own account book he would still fall short of the required stock by five litres, and the contravention would still therefore be there so far as the maintenance of the correct stock by way of a duty to keep an account was there. In that view it would not be necessary to discuss in further detail the evidence of the panch witness or the criticism made against him that he is a person who had been similarly tried for contravention of the provisions of the order and the licence issued to him, also as a retail dealer in kerosene. The argument that it is because of the fact of his prosecution that the witness felt himself under an obligation to support the prosecution, would be quite out of place and unsustainable for the simple reason that such prosecution had eventually culminated in his conviction and he had also been sentenced and, therefore, there was nothing left for the panch witness to be under any sense of obligation, for giving false evidence, for the purpose of escaping the clutches of trial and conviction. The fact which, therefore, must stand proved is that the appellant - accused was found in short stock to the extent of 77 litres of kerosene.

12. In that view, the contravention of the term or conditions Nos. 3(1) and 6(3) (a) of the licence Exhibit 15 issued to him must be taken as duly established, rendering the appellant liable to conviction under S. 3 read with S. 7 of the Essential Commodities Act.

13. Upon conviction the appellant was sentenced to rigorous imprisonment for three months which under S. 7(1)(a)(ii) would have to be as a minimum of three months of imprisonment. It would be appropriate to reproduce the penal section. It reads as under :

"7(1) If any person contravenes any order made u/s 3 -

(a) he shall be punishable, -

(ii) in the case of any other order, with imprisonment for a term which shall not

be less than three months but which may extend to seven years and shall also be liable to fine."

It will, therefore, be appreciated that the trial Court was pleased only to impose the minimum prescribed punishment, so far as the term of imprisonment is concerned. It will be appreciated that there is no further provision which could water down further the minimum term of imprisonment as has been described.

14. Even so, it is very earnestly submitted by Shri Ketkar that a fair number of facts which would entitle the appellant to pray for further leniency are available. In the first instance, the appellant is said to have lost his wife near about the end of 1982, which probably a cause for his not attentive to the observance of all the terms and conditions of the licence. Secondly, he was required to send and keep his son in a nursing home for children suffering from polio and thirdly that soon after this incident on inspection of his shop, the appellant had surrendered his licence and stopped conducting business as a retailer. On inquiry, I am informed that these facts and circumstances had also been brought to the notice of the trial Court when he dealt with the question of punishment. It can only be said, therefore, that these very factors appears to have prompted the learned Judge of the trial Court to restrict the punishment to be awarded to the minimum prescribed.

15. Learned counsel for the appellant Shri Ketkar therefore seeks resort to the provisions of S. 4 of the Probation of Offenders Act and submits that the benefit thereof should also be extended to him, to release him on probation of good conduct. Now it is to be appreciated that the probation of good conduct in the present circumstances would have to be confined with reference to the business and not otherwise and inasmuch as it is the contention of the appellant himself as he had himself stopped business in Kerosene, question of extending any such probation would not arise, and, therefore, the minimum prescribed sentence as awarded would in this case have to be maintained. So far as the fine of Rs. 500/- is concerned, I am informed that it has already been paid.

16. In the result, the appeal must fail. The appellant's conviction and sentence as awarded to the him are both hereby maintained and the appeal is dismissed. The appellant to surrender to his bail within two weeks.

17. Appeal dismissed.