

(1979) 07 BOM CK 0033

In the Bombay High Court

Case No : Criminal Revision Application No. 177 of 1979

Shravan Ganpat Randhir

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-07-1979

Acts Referred:

Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959 — Rule 4, 5
Bombay Prohibition Act, 1949 — Section 66(1), 66(2), 85, 85(1)

Citation : (1979) 07 BOM CK 0033

Hon'ble Judges : S.C. Pratap, J

Bench : Single Bench

Advocate : S.L. Kapse, for the Appellant; R.G. Deo, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S.C. Pratap, J.—This revision application by the original accused one Shravan Ganpat Randhir has been preferred against the order of his conviction and sentence dated 5th August, 1978 passed by the learned Judicial Magistrate, First Class, Baramati, in Summary Case No. 363 of 1975 which order was confirmed by the learned Additional Sessions Judge, Pune, while dismissing the petitioner's Criminal Appeal No. 138 of 1978 on 23rd March, 1979.

2. The original prosecution against the accused was one u/s 66(1)(b) as also section 85 of the Bombay Prohibition Act. Briefly stated, the prosecution case was that on 5th June, 1975 at about 8.30 p.m. The accused visited the house of one Shankar Rayste and demanded money. At that time, the accused was under the influence of alcohol and refused to leave the house of Shankar though asked to do. Shankar thereupon produce the accused at the Police Station, Baramati. Head Constable at the Police Station recorded complaint against the accused. The accused was then sent for medical examination. After completion of investigation and receipt of blood report from the Chemical Analyser, the accused was charge-sheeted in the Court of the Judicial Magistrate, First Class, Baramati,

for the aforesaid offences. Defence of the accused was one of denial. He denied that he had consumed alcohol. He contended that he was actually suffering from diarrhoea and stomach-ache, that he had been advised to take a medicine known as Jeevan Mixture and that he happened to take an over-dose of the said medicine which contained alcohol. He pleaded that he was innocent and claimed to be tried.

3. The learned trial Magistrate came to the conclusion that the prosecution had failed to prove that the accused was found in a public place behaving in a disorderly manner under the influence of drink. It was, however, held that the accused had consumed an intoxicant in contravention of the provisions of the Bombay Prohibition Act and had consequently committed offence u/s 66(1)(b) of the said Act. The accused was acquitted for offence punishable u/s 85(1) of the said Act but was found guilty of and convicted for offence punishable u/s 66(1)(b) of the said Act and sentenced to suffer rigorous imprisonment for three months and to pay a fine of Rs. 500/-, in default, further rigorous imprisonment for six weeks. This conviction and sentence was confirmed by the learned Additional Sessions Judge, Pune, who by his order dated 23rd March, 1979 dismissed the appeal of the accused challenging the said conviction and sentence.

4. In this revision application against the said conviction and sentence, I have heard Mr. S.L. Kapse, the learned Advocate for the petitioner-accused. The State is represented by the learned Public Prosecutor Mr. R.G. Deo.

5. Mr. Kapse, the learned Advocate, submitted that the conviction u/s 66(1)(b) rendered against the accused was unsustainable and was liable to be set aside and quashed. Mr. Deo, the learned Public Prosecutor, on the other hand, contended that there was no reason to interfere with the conviction and sentence against the accused. In support of his submission Mr. Kapse took me through the evidence of the prosecution as witnesses also through the documents on record. He has also referred to the Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959, framed under the Bombay Prohibition Act as also to two authorities both of the Gujarat High Court one in Dalsukhji Varvaji Vs. State of Gujarat, and the other in Malahavarao Bhagwandas Kharade Vs. The State of Gujarat, Submission of Mr. Kapse, at the outset, is that the prosecution has failed to prove compliance with Rule 4 of the aforesaid Rules and consequently on the said failure itself the accused was entitled to an acquittal. Rule 4 in question is as under :

4. Manner of collection and forwarding of blood.---(1) The registered medical practitioner shall use a syringe for the collection of the blood of the person produced before him under Rule 3. The syringe shall be sterilized by putting in boiling water before it is used for the aforesaid purpose. He shall clean with sterilized water and swab the skin surface of that part of such person's body from which he intends to withdraw the blood. No alcohol shall be touched at any stage while withdrawing blood from the body of the person. He shall withdraw not less than 5 c.c., of venous blood in the syringe from the body of the person.

The blood collected in the syringe shall then be transferred into a phial containing anti-coagulant and preservative and the phial shall then be shaken vigorously to dissolve the anti-coagulant and preservative in the blood. The phial shall be labelled and its cap sealed by means of sealing wax with the official seal or the monogram of the registered medical practitioner.

(2) The sample blood collected in the phial in the manner stated in sub-rule (1) shall be forwarded for test to the Testing Officer either by post or with a special messenger so as to reach him within seven days from the date of its collection. It shall be accompanied by a forwarding letter in Form "B" which shall bear a facsimile of the seal or monogram used for sealing the phial of the sample blood."

Construing the said rule along with Rule 5, the Gujarat High Court has in the case of Dalsukhji Varvaji v. State of Gujarat, supra held that the prosecution solely relying on the report of the Chemical Analyser for blood concentration will not be entitled to the benefit of the presumption u/s 66(2) of the Bombay Prohibition Act and such a presumption cannot, in the circumstances, be drawn against the accused.

6. In the subsequent ruling of the Gujarat High Court in Malshavarao v. State of Gujarat, supra it was held that Rule 4 in question was mandatory and must be scrupulously followed and breach thereof would result in making the Chemical Analyser's certificate invalid and inadmissible. Applying the ratio of the aforesaid rulings to this case, what do we find ? Going through the evidence of the Medical Officer P.W. No. 1 Dr. Hargovind Kunjuram, I find that all that he states qua Rule 4 aforesaid is as follows :---

"I applied only hot water to the body of the accused before collecting the blood. I took out the blood out of the person with the syringe. I put the blood in the phial with the preservative nearby potassium chloride. I sealed the phial. "

Now, when one turns to Rule 4, the requirements are as follows :

(a) The registered medical practitioner shall use a syringe for the collection of the blood.

(b) The said syringe shall be sterilized by putting in boiling water before it is used for the aforesaid purpose.

(c) He shall clean with sterilized water and swab the skin surface of that part of such person's body from which he intends to withdraw the blood.

(d) No alcohol shall be touched at any stage while withdrawing blood from the body of the person.

(e) He shall withdraw not less than 5 c.c. of venous blood in the syringe from the body of the person.

(f) The blood collected in the syringe shall then be transferred into a phial

containing anti-coagulant and preservative.

(g) The phial shall then be shaken vigorously to dissolve the anti-coagulant and preservative in the blood.

(h) The phial shall be labelled and its cap sealed by means of sealing wax with the official seal or the monogram of the registered medical practitioner.

These then are the mandatory requirements of Rule 4 as was held by the Gujarat High Court in the rulings referred to above. Bearing in mind these mandatory requirements, if we go through the evidence of the Medical Officer in the present case, we find fatal lacunae in the prosecution case in the matter of fulfilment of the aforesaid mandatory requirements. There is absolutely no evidence before the Court to come to a conclusion in favour of the prosecution that the syringe in question was sterilized in the present case with boiling water before being used for taking the blood. Nor is there any evidence before the Court to come to a conclusion in favour of the prosecution that the Medical Officer cleaned with sterilized water and swabbed the skin surface of that part of the body from which blood was intended to be drawn. Nor is there any evidence before the Court to come to a positive conclusion in favour of the prosecution that the blood collected in the syringe was transferred into a phial containing anti-coagulants and preservative nor any evidence before the Court to conclude that the phial was then Shaken vigorously to dissolve anti-coagulants and preservative in the blood. These indeed are important requirements if the report of the Chemical Analyser is to be implicitly relied upon by the Court in order to reach conclusion one way or the other in a prosecution as of the instant nature. In the absence of any evidence in favour of compliance of the aforesaid requirements, the report of the Chemical Analyser will lose all evidentiary value. Indeed, as held by the Gujarat High Court the said report would become inadmissible. If the report becomes inadmissible, then there is no legal evidence before the Court to come to a conclusion against the accused for the offence with which he has been charged. Mr. Kapse, is thus right in his contention that as there has been positive failure on the part of the prosecution to establish strict compliance with the mandatory requirements of Rule 4, the accused would, on that ground itself, be entitled to an acquittal.

7. Mr. Kapse further brought to my attention certain other relevant factors from the record. He submitted that though blood was supposed to have been taken on 5-6-1975, it was given to Constable Kale on 6-6-1975 for being taken to the Chemical Analyser and it was actually handed over to the office of the Chemical Analyser on 9-6-1975. In the submission of the learned Advocate, there is no evidence to satisfactorily account for the custody of the said blood phial for 6-6-1975 to 9-6-1975. There is some substance in this contention. One cannot, in the circumstances, safely rule out the possibility of the blood phial being either altered or substituted.

8. Mr. Kapse further submitted that his defence of having taken Jeevan Mixture

could not have been summarily rejected only because the accused was unable to examine the doctor who prescribed the said medicine. Now, in this behalf, it is possible, in a given case, to come to a conclusion that the accused has displaced the presumption arising against him by leading appropriate evidence regarding at least the probability of the defence in the aforesaid behalf. He need not prove the defence beyond reasonable doubt. The question whether, in this case, in all the facts and circumstances, the accused can be said to have displaced that presumption will, however, arise only when the said presumption is, in the first place, legitimately raised against the accused. On the very evidence of the Medical Officer and in the face of the mandatory requirements of Rule 4, such a presumption cannot be legitimately raised against the accused in this case. The question of rebutting or displacing the said presumption does not, therefore, survive. It is again unnecessary to go further into these aspects and contentions, as the very first submission of the learned Advocate and a finding thereon more than sufficiently warrants reversal of the conviction and sentence and passing of an order of acquittal in favour of the accused.

9. In the result, this revision application is allowed. The impugned order of conviction and sentence against the accused is set aside and quashed and the accused stands acquitted of the offence punishable u/s 66(1)(b) of the prohibition Act. Fine, if any, paid will be refunded. Rule absolute. Bail bond will stand cancelled.