
(1952) 09 GUJ CK 0001
In the Gujarat High Court

State (Sessions Judge)

APPELLANT

Vs

Haku Khoda

RESPONDENT

Date of Decision : 23-09-1952

Acts Referred:

Constitution of India, 1950 — Article 19

Citation : AIR 1953 Guj 161 : (1953) CriLJ 1521

Hon'ble Judges : Shah, C.J;Baxi, J

Bench : Division Bench

Judgement

Baxi, J.—The Sessions Judge, Central Saurashtra District, has made this reference bringing to our notice the order of the First Class Magistrate Rajkot, passed in Criminal Case No. 14 of 1952 acquitting the opponent of a charge u/s 66(b) of the Prohibition Act.

2. The facts of the case are very simple. The opponent, a police constable, was found in a drunken condition in a cinema theatre in Rajkot and on the complaint of the doorkeeper he was taken in custody and sent to the Doctor who found that he was drunk and was not in a position to take care of himself. He was thereupon put up for trial before the learned Magistrate u/s 66(b) of the Prohibition Act and was tried summarily and acquitted. The opponent's defence was that he had taken Eau de Cologne as he was suffering from cold. The prosecution examined the Doctor, the complainant and the cinema doorkeeper while the opponent examined Chhagan Harjivan who also serves in the police headquarters. After hearing the evidence on both sides the learned Magistrate acquitted the opponent.

3. It appears from the learned Magistrate's order that he has treated the case perfunctorily and to writing out his order he has Ignored the provisions of Section 264, Cr.P.C. which requires that a judgment in an appealable case should contain the particulars mentioned in Section 263 and should embody the substance of the evidence. It is very Important that these provisions should strictly be complied with for his Judgment is the only record in the appellate

Court and unless the provisions of this section are scrupulously followed and complied with, the appellate Court will have no material to judge the correctness or otherwise of the Magistrate's decision. The learned Magistrate has not set out the substance of the prosecution evidence particularly the Doctor and the defence witness Chhagan Harjivan who are very important witnesses in this case. Similarly he has not recorded in his judgment the opponent's plea and his examination. The judgment starts with a negative finding that the first information report and the charge-sheet do not show that the accused committed an offence u/s 66(b). The learned Magistrate does not appear to have addressed himself to the facts alleged against the opponent and how the prosecution has not proved the case nor does the judgment show that he applied his mind to the defence set up by the opponent, though the learned Sessions Judge thinks that he acquitted the opponent probably because in his view drinking of Eau-de-Cologne was not an offence. But the judgment gives us no idea of the materials which induced his decision and deserves to be set aside on the ground that it is not a judgment at the learned Sessions Judge, however, has gone through the record of the case and has given his finding on the evidence recorded by the Magistrate. Though this is not strictly in accordance with law, we do not propose to remand the case as, in our opinion, the reference can be disposed of without a remand.

4. The learned Sessions Judge found that the evidence of the Doctor and the defence witness as well as the statement of the accused proved that the opponent had drunk Eau-de-Cologne within the limits of Rajkot and that he is liable to be punished u/s 66(b) of the Prohibition Act. The Advocate General supports the reference.

5. The opponent's learned Advocate, however, argued that Eau-de-Cologne was a toilet preparation and Section 13(b) of the Prohibition Act, so far as it affected the consumption or use of such medicinal and toilet preparations, was declared invalid by the Supreme Court in the-State of Bombay v. P.N. Balsara AIR 1951 S.C. 318 , and the opponent could not be punished under the Act for drinking Eau-de-Cologne. He conceded that the use of Eau-de-Cologne as a drink amounted to its perverted use or misuse but such misuse should, according to him, be prevented by proper legislation and not by total prohibition of the use and possession of such preparations. The decision of the Supreme Court cited by the learned Advocate was given on appeal from the decision of the Bombay High Court- Fram Nusservanji Balsara Vs. State of Bombay and Another, . The learned Sessions Judge has referred to Bombay decision also and has quoted the following passage from that judgment. This passage has also been quoted by the Supreme Court (page 328):

To put it in a simple form, the question to which we have to address ourselves is whether the Legislature can prohibit the legitimate use of an article which ordinarily is not drink, merely because its use may be perverted for the possible purpose of defeating or frustrating the objects and purposes of the Prohibition

Act. Let us take the concrete case of eau-de-cologne or lavender water. Their legitimate use is only for the purpose of toilet. They contain spirit and it may be that an addict deprived of his drink may drink it in order to satisfy his thirst, is it permissible to the Legislature under such circumstances to deprive the general public of the legitimate use of eau-de-cologne or lavender water as articles of toilet? The Legislature may prevent the abuse of these articles, but can it prevent legitimate use? It is difficult to understand how any restriction on the legitimate use of these articles can be in the interests of the general public so as to make these restrictions reasonable within the meaning of Article 19(5). If a citizen uses eau-de-cologne or lavender water for the purpose of toilet, he is not doing anything against public interest. It is only when he is perverting their use that it may be said that he is acting against public interest. Therefore, in our opinion, while it was open to the Legislature to provide against the abuse of these articles, it was not open to it to prevent its legitimate use. But the Legislature has totally prohibited the use and possession of all liquids containing alcohol except under permits to be granted by Govt. It is contended by the Advocate-General that a citizen may possess eau-de-cologne or lavender water under a permit. But that is a restriction upon the right of the citizen to acquire, hold & dispose of property, &, in our opinion, that restriction is not reasonable. The same argument applies to medicinal & toilet preparations containing alcohol. Therefore we hold that to the extent to which the Prohibition Act prevents the possession, use and consumption of non-beverages and medicinal & toilet preparations containing alcohol for legitimate purposes the provisions are void as offending against Article 19(D)(f) of the constitution even if they may be within the Legislative competence of the Provincial Legislature.

Fazl Ali J. who delivered the judgment of the Supreme Court expressed his concurrence with this part of the judgment and observed as follows (p. 329):

I do not consider that it is reasonable that the possession, sale, purchase, consumption or use of medicinal and toilet preparations should be prohibited merely because there is a mere possibility of their being misused by some perverted addicts.

His Lordship then considered two Notifications of the Government of Bombay issued u/s 139 of the Prohibition Act which exempted duty paid spirituous toilet preparations and certain classes of duty paid spirituous medicinal preparations from the following provisions of the Act: (1) Section 12(c); (2) Section 12(d) in so far as it relates to buying of such preparations; and (3) Section 13(b) in so far as it relates to use of such preparations. The sale of these articles was not covered by those sections but was regulated by two notifications dated 6.4.50 and 11.4.50 which imposed limits of sale. In view of these restrictions on the sale of these preparations, His Lordship was of the opinion that the restrictions imposed by the Act even when read with the above notifications were not reasonable and declared the following provisions to be invalid on this ground, viz., : (1) Clause (c) of Section 12 so far as it affects the possession of liquid

medicinal and toilet preparations containing alcohol; (2) Clause (d) of Section 12 so far as it affects the selling or buying of such medicinal and toilet preparations containing alcohol : and (3) Clause (b) of Section 13, so far as it affects the consumption or use of such medicinal and toilet preparations containing alcohol.

6. In Saurashtra, the Government has Issued notification No. Rev /Ex/ 2270 dated 7/12 July 1950 u/s 139 of the, Act exempting certain spirituous preparations from the prohibition against buying, import, export, use, possession and consumption contained, in the Prohibition Act. The exemption is extended to:

1. Duty-paid perfumed spirits excluding Eau-de-Cologne.
2. Duty-paid Essences.
3. Duty-paid spirituous Toilet Preparations (excluding Lavender water).
4. Duty-paid spirituous medicinal /preparations, containing not more than 10/per cent, of alcohol or 17.5 per cent, of proof spirit.
5. Duty-paid spirituous medicinal preparations, which contain more than 10 per cent, of alcohol or 17.5 per cent, of proof spirit but which are not used for internal consumption.

We need confine our discussion to items Nos. 3-4 and 5 only. Now all these preparations are exempted from (i) Section 12(c) and (ii) Section 12(d) in so far as it relates to buying of such preparations. But the notification does not exempt them from the restriction against their sale. Next sprituos toilet preparations which are evidently not meant for internal consumption and spirituous, medicinal preparations which contain more than 10 per cent, of alcohol or 17.5 per cent, of proof spirit but which are not used for internal consumption (items Nos. 3 and 5) have been exempted from Section 13(b) so far as it relates to the use-of such preparations; while the spirituous medicinal preparations containing not more than 10 per cent, of alcohol or 17.6 par cent, of proof spirit (i.e. item No. 4) have been exempted "altogether" from Section 13(b). This distinction in the terminology in the case of items Nos. 3 and 5 which are-meant for internal use only and item No. 4 cannot fail to strike one as showing that in the case-of preparations not intended for internal consumption the Legislature intended to remove restriction on external use only and retain it against their, internal consumption while medicinal preparations containing less than 10 per cent, alcohol are permitted to be consumed both internally and externally. Eau-de-Cologne is a spirituous toilet preparation meant for external use only and the Act prohibits its internal consumption Le. drinking and it is reasonable to prohibit citizens from drinking it. The reasonableness of this restriction, will not be affected whether its sale is restricted or not, a point on which we have no information excepting the notification itself by which their sales are not exempted. From Fazl Ali is summary of the provisions of the Bombay notification we do find that the distinction between internal and external consumption has not been made and all preparation sare stated to have been exempted from

Section 13(b) so far as it relates to their "use" (vide p. 329 of the Supreme Court judgment). The Saurashtra Government notification, however, makes that distinction and prohibits the drinking of only those medicinal and toilet preparations meant for external use and; this distinction makes the restriction reasonable. We hold, therefore the opponent committed an offence u/s 66(b) by drinking Eau-de-Cologne.

7. The next question is what orders should be passed. We have given our findings both on law and the facts. A conviction and sentence must follow on these findings as a matter of course and logically it would be our duty to convict the opponent and sentence him. However we are exercising revisional powers and although we can set aside the order of acquittal we have no powers to convert a finding of acquittal into one of conviction (See Section 439(4), Cr.P.C.). All that we can do is to order a retrial. In this case if we make that order we shall serve the Magistrate with ready made findings and all that will remain for him is to record the conviction and pass a sentence. This cannot be called a retrial by the Magistrate for his right to decide every issue arising in the trial independently is to all intent taken away and he will merely register our findings and convict the opponent on them. This would be an evasion of Section 417, Cr.P.C. There is therefore no point in ordering the opponent's retrial. In the absence of an appeal from the Government u/s 417, Cr.P.C. we have no power to set aside the opponent's acquittal and convict him even though we may be satisfied that the learned Magistrate's order is wrong and contrary to law. All that we can do in this reference, therefore, is to state that the learned Magistrate should have convicted the opponent. With these observations the reference is rejected.

Shah, C.J.

8. I agree.