

(2017) 03 GUJ CK 0204
In the Gujarat High Court
Case No : 165 of 2006

THE STATE OF GUJARAT

APPELLANT

Vs

KIRANKUMAR KANTILAL TRIVEDI

RESPONDENT

Date of Decision : 23-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 378\(1\)\(3\)](#) - Appeal in case of acquittal
[Indian Penal Code, 1860](#), [Section 307](#) - Attempt to murder
[Bombay Prohibition Act, 1949](#), [Section 129\(A\)\(2\)](#) -
Gujarat Prohibition Act, 1949, Section 85(1)(3), Sections 66(1)B

Citation : (2017) 03 GUJ CK 0204

Hon'ble Judges : A.G.Uraizee

Bench : Single Bench

Advocate : KL PANDYA, HARDIK H PANDIT

Judgement

1. State has preferred the present appeal under Section 378 (1) (3) of the Code of Criminal Procedure, 1973 ("the Code" for short), to assail the judgment and order of acquittal dated 03.10.2005 passed by learned Presiding Officer, Fast Track Court No.2, Gandhinagar in Criminal Appeal No.14 of 2005 whereby and whereunder the judgment and order of conviction dated 12.07.2005 passed by learned 6th Additional Senior Civil Judge and Judicial Magistrate First Class, Gandhinagar in Criminal Case No.3997 of 2001 whereby the respondent was convicted for the offence punishable under Sections 66(1)B of Prohibition Act and is directed to suffer simple imprisonment of three months and to pay fine of Rs.500/and also under Section 85(1) (3) of Prohibition Act and was directed to suffer simple imprisonment for three months and to pay fine of Rs.500/I. D.S.I. for 15 days is quashed and set aside and the respondent is acquitted.

2. The facts in nutshell giving rise to this appeal is that on 26.04.2001 on S.T. Stand, Gandhinagar, respondent accused was found in drunken condition without

any pass or permit and he was not able to walk and talk at the relevant point of time. It is further the case of prosecution that in drunken condition, respondent accused had climbed upon S.T. and pushed away the Driver of the S.T. MR. Govindbhai Raval who was taking his lunch and thereby caused severe fracture to him, therefore, two separate charge sheets were filed against the respondent accused, one for the offence under sec. 307 of Indian Penal Code and another is for the offence under the Bombay Prohibition Act and charge sheet was filed before the Court of learned Joint Judicial Magistrate, First Class, Gandhinagar which was committed to the Court of learned 6th Additional Senior Civil Judge, Gandhinagar for its final disposal. The learned Judge after appreciating necessary evidence laid down by the prosecution was pleased to convict the respondent by order dated 12.07.2005 for the offence under Section 85(1)(3) and 66(1)(b) of Bombay Prohibition Act and ordered to suffer simple imprisonment of three months and fine of Rs.500/.

3. Being aggrieved and dissatisfied with the aforesaid order, the present respondent - appellant accused preferred Criminal Appeal No.14/2005 before the Court of learned Presiding Officer, 2nd Fast Track Court, Gandhinagar. The learned Judge, after hearing arguments from both sides and appreciating evidence on record of the case, was pleased to quash and set aside the order of conviction dated 12.07.2005 passed by learned 5th Additional Senior Civil Judge, Gandhinagar in Criminal case No.3997 of 2001 convicting the accused for the offence under Section 66(1)(b) and 85(1)(3) of Bombay Prohibition Act by order dated 03.10.2005.

4. I have heard Mr. K.L. Pandya, learned Additional Public Prosecutor for the State and Mr. Hardik Pandit, learned advocate for the respondent.

5. Mr. Pandya, learned APP submits that the lower appellate Court has upturned the conviction of the respondent on singular ground that the anticoagulant and preservative were not added in the phial by the Doctor himself relying upon the decision of this Court in the case of Kalidas Dhulabhai Vaghela v. State of Gujarat, 1995 (2) GLH 933. It is his submission that the findings recorded by the lower appellate Court is contrary to the evidence of Doctor Jayendrabhai Ratilal Modi (Exhibit9) who has very clearly stated that he himself has put the anticoagulant and preservative in the phial. He, therefore, urges that the appeal may be allowed and the judgment and order of conviction recorded by the learned Magistrate may be restored.

6. Mr. Hardik Pandit, learned advocate for the respondent has supported the impugned judgment and order of the lower appellate Court. He further submits that the evidence of Doctor Jayendrabhai Ratilal Modi, makes it very clear that the doctor had received the anticoagulant and preservative and had not prepared these two substances himself, and therefore, it amounts to the breach of Rule 4 of Bombay Blood Test Rules. It is held to be mandatory by this Court. It is his further submission that Section 129(A)(2) of Bombay Prohibition Act requires that the sample of blood shall be collected by the authorized medical practitioner,

and therefore, the breach of Rule 4 of Bombay Blood Test Rules, is apparent, and the lower appellate Court has not committed any error in upturning the conviction of the respondent. He, therefore, urges that the appeal may be dismissed. In support of his submission, he has placed reliance upon the decision of this Court in the case of *State of Gujarat v. Lakshman Sinh Khumanji Barot*, (1996) 2 GLR 707. He further submits that the scope of criminal acquittal appeal is limited and when two views are possible, view adopted by the trial Court cannot be substituted by another plausible view in acquittal appeal. In support of this submission, he has placed reliance upon the decision of the Supreme Court in the case of *Union of India v. Bal Mukund and others*, 2009 (2) GLH 471.

7. Alternatively, he submits that the respondent is in advance age and suffering from multiple health problems. Therefore, instead of restoring the punishment for imprisonment, the fine may be enhanced and the judgment of the lower appellate Court may be modified accordingly. In support of this contention, he has placed reliance on the decision of this Court in the case of *State of Gujarat v. Natwar Harchandji Thakor*, 2005 1 GLR 709.

8. Before examining the rival submissions, it would be apposite to examine the provisions of the Rule 4 of the Bombay Blood Test Rules (Medical Examination and Blood Test Rules, 1959) which reads as infra: "4. Manner of Collection 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 cc of venous blood in the syringe from the body of the person. The blood, collected in the syringe shall than be transferred into a phial containing anticoagulant and preservative and

9. The aforesaid provision came to be considered by this Court in the case of *Kalidas D. Vaghela* (supra) has held in paragraph No.2 as under:"(2) The sample blood collected in the phial in the manner stated in subrule (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." It is clear on plain reading of the aforesaid Rule 4 that the blood is to be collected in the syringe and to be transferred into phial containing anticoagulant and preservative and it has to be done by the doctor. It is not clear from the material on record as to at what point of time the anticoagulant and preservative were added in the prepared phial which was given to P.W. 3 for the purpose of collection of blood of the accused. This is grave infirmity in the process of collecting the blood of the accused. It is, therefore, in clear breach of the above Rule 4. it is also clear from the evidence on record that the anticoagulant and the

preservative which had to be added were not added by the Doctor himself. As observed above, the Doctor admitted that he had received a ready phial containing anticoagulant and preservative. There is no evidence or other material on record to show as to who in fact put anticoagulant and preservative in the phial and at what time it was so placed in the phial. The doctor has also admitted that the syringe was made clear and sterilized by the Hospital Peon. Rule 4 of the said Rules of 1959, inter alia, requires that the blood collected in the syringe shall be transferred into phial containing anticoagulant and preservative. Admittedly, this was not done by the Doctor. This is in violation of the mandatory provisions contained in the Rule 4. This infirmity is of fatal nature and vitiates the order of conviction."

10. Similar view is taken by this Court in the case of Lakshman Sinh Khumanji Barot (supra) in paragraph No.5 reads as under:" 5. It appears from the aforesaid provision of Rule 4 that in order to ensure proper dispatch and identification of blood sample drawn from the person of the accused, it should be sent to the public analyst in prescribed manner so as to avoid any scope of manipulation or tampering with the sample of blood. Thus, there is healthy and wholesome object for making such provisions of Rule 4. It cannot be disputed that the view of the trial court that material mandatory requirements of Rule 4 are not satisfied. This court is satisfied that the trial Court is justified in reaching such a finding and conclusion, Dr. Kamlesh was the concerned medical officer who had drawn blood sample from the person of the accused. He has clearly admitted in his evidence that he had not cleaned the phial or examined the phial before the sample blood was put in the phial. The person who had done the required process under Rule 4 is not examined. Therefore, in the light of the facts and circumstances of the case, the procedural safeguards prescribed in rule 4 so as to ensure better dispatch and analysis of the incriminating sample taken from the accused, are not satisfactorily established. This appeal can be disposed of on the aforesaid sole ground and, therefore, it would not be necessary to divulge or address on other aspects. Since the material mandatory provisions of Rule 4 of the Rules are not satisfied and complied with, this appeal is required to be dismissed on this sole ground. Accordingly, it is dismissed."

11. It is thus clear from the aforesaid decision that the provisions of Rule 4 of the Rules are mandatory, infraction whereof vitiates the prosecution.

12. Mr. Pandya, learned APP relied upon the decision of this Court in the case of Avadh Bihari Amrutlal v. State of Gujarat, (2000) 3 GLR 2386, wherein, this Court has held that the entire Rule 4 is not mandatory. Be that as it may, the moot question, which is required to be considered is whether the lower appellate Court was justified in recording the findings that the Medical Officer has recorded the findings that the respondent is required to be acquitted on the ground of breach of Rule 4 as Medical Officer stated in his evidence that he himself had not put the anticoagulant and preservative in the phial.

13. The evidence of Doctor Jayendrabhai Ratilal Modi is the fulcrum to examine

the correctness of the findings recorded by the lower appellate Court.

14. Doctor Jayendrabhai Ratilal Modi, who was examined vide Exhibit 9 has stated in his oral evidence that the respondent was brought before him at about 4.15 a.m. on 26.04.2001 for the medical examination. It further emerges from the evidence that he himself has taken the blood sample in sterilized phial. Thereafter, he had put anticoagulant and preservative supplied to him by the hospital and then shook the phial slowly to mix the preservative and anticoagulant. Thus, it is very clear from his oral evidence that the procedure of mixing the preservative and anticoagulant in a phial was done by the doctor himself. In light of this clear cut evidence it is made difficult to comprehend and fathom as to on what basis the lower appellate Court has recorded the findings that these two processes were not done by the medical officer himself to overturn the judgment and order of conviction recorded by the lower appellate Court on the basis of decision of this Court in the case of Kalidas Dhulabhai Vaghela (*supra*).

15. The learned advocate for the respondent has relied upon the provisions of Section 129(A)(2) of the Bombay Prohibition Act to buttress his submission that the procedure is to be done by the registered medical practitioner himself. Rule 12(A)(1) mandates that the Investigating Officer who has reasonable ground for believing that a person has assumed as intoxicant may produce such a person before the authorized medical practitioner for the purpose of medical examination to collect the blood of such person to determine the percentage of alcohol therein. Rule 2 thereon obligates such authorized medical officer himself to collect the blood of such person and furnish it to the Investigating Officer for testing it by officer appointed under Sub Rule (1). The Provision of Rule 12(A) cannot be said to have been breached because it is evident from the evidence of the Doctor that he himself examined it and collected the blood of the respondent in the prescribed manner. The case on hand, it is explicitly clear from the evidence of the doctor the procedure was done by the doctor himself, and therefore, the findings recorded by the lower appellate Court that the procedure was not done by the doctor himself is perverse inasmuch as it is vividly clear that the lower appellate Judge has overturned the well reasoned judgment in order of conviction passed by the learned Magistrate without appreciating the evidence of the doctor in proper perspective, and therefore, it warrants interference in this appeal.

16. So far as the alternative submission of the learned advocate for the respondent to enhancement in the fine in place of the sentence with imprisonment of three years is concerned, on the ground of the age and health of the respondent in the decision in the case of Natwar Harchandji Thakor, (*supra*) this Court has held that less than minimum sentence can be awarded. This finding is qualified one and for imposing less than minimum sentence special reasons are to be assigned that too in the case of first offence by the accused. In the present case there is nothing to indicate that earlier also the

respondent was involved in similar offence, but, at the same time no special reason exist except the submissions of the learned advocate for the respondent that the respondent is suffering from unspecified multiple health issues to award less than minimum sentence. Under the circumstances, less than minimum sentence as prescribed by the concerned section of the Prohibition Act cannot be imposed.

17. Learned advocate for the respondent is also relying upon the decision of the Supreme Court in the case of Bal Mukund and others (supra) to continue two views are possible, the view adopted by the learned trial Court cannot be substituted by another view of acquittal appeal. Herein, in the present case, no case two views. The perversity committed by the lower appellate Court is palpable, and therefore, there is no question of substituting the view adopted by the learned trial Court by another view. In fact, this is the case wherein illegality and perversity committed by the lower appellate Court is required to be set right and corrected.

18. For the foregoing reasons, this appeal succeeds and is hereby allowed. The impugned judgment and order of acquittal dated 03.10.2005 passed by learned Presiding Officer, Fast Track Court No.2, Gandhinagar in Criminal Appeal No.14 of 2005 is hereby quashed and set aside. The judgment and order of conviction dated 12.07.2005 passed by learned 6th Additional Senior Civil Judge and Judicial Magistrate First Class, Gandhinagar in Criminal Case No.3997 of 2001 is hereby restored with a clarification that the substantive sentence imposed on the respondent under Section 66(1)B and Section 85(1)(3) of the Prohibition Act are directed to run concurrently under Section 31(1) of the Code.

19. The respondent is directed to surrender to the Jail Authority within two months from the date of receipt of the certified copy of this judgment to serve out the sentence. 20. Record and Proceedings is ordered to be remitted back to the lower Court forthwith.