

Md. Abdul Matlib Vs. State of Assam

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Court : Guwahati

Decided On : Nov-21-1989

Judge : J.M. Srivastava, J.

Acts : Assam Liquor Prohibition Act, 1952 - Sections 4; Opium Act; [Probation of Offenders Act, 1958](#); Code of Civil Procedure (CPC) , 1974 - Sections 293, 293(4), 294 and 360; Code of Civil Procedure (CPC) , 1898 - Sections 510

Appeal No. : Criminal Revn. No. 14 of 1983

Appellant : Md. Abdul Matlib

Respondent : State of Assam

Advocate for Def. : B.B. Narzary, Govt. Adv.

Advocate for Pet/Ap. : S.N. Bhuyan, B.D. Agarwal and L. Ali, Adv.

Disposition : Petition dismissed

Prior history : J.M. Srivastava, J. 1. This revision is directed against the judgment and order dated 6-1-83 passed by the learned Sessions Judge, Now-gong. 2. Briefly, the facts are that the petitioner was prosecuted for having committed offence under Section 4 of the Assam Liquor Prohibition Act, 1952, hereafter the 'Act', on the allegations that on 23-11-78 at about 7a.m., when K. R. Laskar, Inspector of Excise, hereafter referred as the 'Inspector' conducted search of the petitioner's residential house

Judgement :

J.M. Srivastava, J.

1. This revision is directed against the judgment and order dated 6-1-83 passed by the learned Sessions Judge, Now-gong.

2. Briefly, the facts are that the petitioner was prosecuted for having committed offence under Section 4 of the Assam Liquor Prohibition Act, 1952, hereafter the 'Act', on the allegations that on 23-11-78 at about 7a.m., when K. R. Laskar, Inspector of Excise, hereafter referred as the 'Inspector' conducted search of the petitioner's residential house and its compound in village Sutahayabargaon, in his and the presence of the witnesses, a drum and two tins containing about 50 kgs. of 'fermented wash' were found in the compound of the house of the petitioner. A bottle containing about 750 ml. illicit distilled liquor and distilling apparatus from the backside of the petitioner's house were also found which were seized and later sample of liquor seized was sent for chemical examination. The Chemical Examiner (Excise) reported that the sample was 'alcoholic liquor'. The prosecution examined three witnesses including the 'Inspector'. The defence plea was of total denial. The learned trial Court found, the petitioner had committed the offence punishable under Section 4 of the Act, and accordingly sentenced him to rigorous imprisonment for six months and a fine of Rs. 500/-. In appeal, the learned Sessions Judge upheld the findings of the learned trial Court and dismissed the appeal.

3. Sri S. N. Bhuyan, learned Counsel for the petitioner has submitted that it was not proved that any liquor had been found from the residence of the petitioner, that it was not proved that the 'material' seized was liquor for the sample was sent for examination after considerable delay, with the result that due to fermentation increase in alcoholic strength, could take place, that the witnesses for the prosecution were not reliable and it was not proved that the search had been conducted in the manner required, that the fact that the aforesaid articles were stated to have been recovered from the compound of the petitioner did not mean that the same had been in conscious possession of the petitioner, i.e. the

probability that the same had been kept there by somebody else could not be excluded and finally that the petitioner should be given benefit of probation under Section 360 of the Code of Criminal Procedure, hereafter the Code.

4. Sri B. B. Narzary, learned P.P., has refuted the submissions for the petitioner, and has submitted that the material was proved to have been illicitly distilled liquor and distilling apparatus had been recovered from the compound of the house of the petitioner and there was no suggestion that somebody else could have kept it in the compound of the petitioner, that therefore when on search on the aforesaid day and time by the Inspector, the aforesaid articles had been recovered from his possession, the petitioner could not disown liability for the same. Sri Narzary has also submitted that the slight delay in sending the sample for chemical analysis could not make any difference to the fact that the material seized was alcoholic liquor and in any case the fact that the distilling apparatus had also been recovered in itself would constitute offence punishable under Section 4 of the Act and hence even if it is accepted for the sake of argument that the fermented wash and liquor be excluded from consideration, the recovery of distilling apparatus from the compound of the petitioner was itself an offence punishable under Section 4 of the Act, and so any infirmity in regard to the chemical analysis report would not make any difference.

5. I have considered the submissions for the parties and the materials on record.

6. The Courts below have on appreciation of evidence, held that the evidence for the prosecution was reliable, and that it was established that on the aforesaid day, time and place, on search made by the Inspector, a drum and two tins containing fermented wash, a bottle containing some liquid and distilling apparatus had been found from the compound of the petitioner.

7. Sri S. N. Bhuyan, learned Counsel for the petitioner has submitted that P.W.-2 Innus Ali and P.W.-1 Jalaluddin had made statements that they had not known the accused and that what was written on the seizure memo was not read over and they did not know its content, that they had just put their signatures without knowing what was written and that therefore the seizure was not proved. Sri Bhuyan has submitted that Ext. 1, the seizure memo was in English and obviously

the witnesses could not have known what had been written and hence the seizure was not in accordance with law, and that therefore it had not been proved that on search, the aforesaid materials had been found from the petitioner's compound. P.W.-1 Jalaluddin admitted that his earlier statement that he did not know the accused was wrong, in that he said that he knew the petitioner. It is obvious that the witnesses have tried to help the petitioner, in whatever manner they could, even otherwise it is not reasonable to accept the witnesses who belonged to the same village would not have known the petitioner. As regards the statement of the witnesses that they did not know the contents of Ext. 1 and that they had just put their signatures without knowing what was written therein is concerned, the Courts below have not accepted their statements. The Inspector has said that he had prepared the seizure memo Ext. 1 in presence of the witnesses and they had affixed their signatures on it. There is nothing in evidence which may indicate or show that the Inspector had any reason to obtain signatures of the witnesses without making them know what was written and it is improbable that the witnesses would put their signatures without knowing what it was all about. I, therefore, do not accept the submission that just because Ext. 1 was written in English and the witnesses did not know English, they did not know its contents and had just put their signatures on it.

8. The next submission for the petitioner was that the compound of the petitioner did not have boundary wall or any fencing, and that the mere fact that the aforesaid materials had been recovered from the compound did not mean that the aforesaid materials belonged to the petitioner, or that it had been in his conscious possession. While it is possible that an owner of a house with compound may not know as to what was there in the compound, in my opinion, in the facts and circumstances of the present case there was no such probability, particularly when the petitioner was present at the time of search in presence of the witnesses and did not come out with any such version that he was not aware of what the material was or that it had been put by somebody else. Why should somebody else have put the materials in the compound of the petitioner without his knowledge has not been explained, such as that because of ill-will somebody had kept the materials there to falsely implicate him. On mere hypothetical proposition, the prosecution version and evidence in its support could not be rejected.

9. Sri S. N. Bhuyan, learned Counsel for the petitioner, has argued that it was not proved that the petitioner was in conscious possession of the said materials, recovered from his compound, and has relied upon *Abdul Ali v. The State*, AIR 1950 Assam 152: (1950 (51) Cri LJ 973) and *Dular Kumar v. The State*, AIR 1952 Assam 26. The cases related to recovery of opium for offence committed under the Opium Act. The provisions of the Opium Act are similar to the provisions of the Act, and it was held that just because recovery of opium had been made from the house of the offender where there were other inmates, it could not be said that the offender had been in possession and it was emphasised that the prosecution must prove 'conscious possession' of the offender. There should be no doubt that where possession of some substance is an offence, as in the instant case the prosecution must prove that the alleged offender was in conscious possession of it. It shall, however, depend on the facts of each case how and by what evidence the prosecution proved that the alleged offender had been in conscious possession of the substance. In the cases cited some quantity of opium was recovered from the house with other inmates, anyone of whom could also have brought and possessed it. In the facts of the present case which are quite different, a drum, two tins containing fermented wash, a bottle containing liquor and distilling apparatus had been recovered from the compound of the house of the petitioner. There is no evidence on record to show that there were some other inmates in the house, and considering the nature of materials seized which were not insignificant in size, it is not reasonable to accept that the petitioner did not know about or could not have been aware of the materials seized from the compound of his house, if indeed he had nothing to do with it. I am, therefore, unable to accept the contention and think that in this case it is not reasonably possible to take the view that the petitioner was not in conscious possession of the materials which on search had been found and seized, and so the possession thereof was punishable under Section 4 of the Act. The findings of the Courts below are quite sound and suffer from no infirmity as may require any interference.

10. Insofar as the next submission in regard to the Chemical Examiner's report is concerned, while it may be said that there was some delay, in that, seizure had been made on 23-11-78 (Ext. 1) and the Inspector had applied for taking the sample on 24-11-78 but it was taken on 4-12-78 and sent to Chemical Examiner,

yet the said delay, in my opinion, did not make any material difference, firstly because the substance in the bottle which was seized on 23-11-78 was also alcoholic liquor and even assuming for the sake of argument that due to some delay, percentage of alcoholic content had increased, it could not have increased to the extent so as to make the substance if it was not alcoholic into alcoholic liquor.

11. Sri Bhuyan, learned Counsel for the petitioner, has next argued that the Chemical Examiner's report had not been proved and that the provisions of Section 294, C.P.C. had not been followed, in that the report had not been put to the petitioner to admit or accept the same and hence the Chemical Examiner's report could not have been accepted and used as evidence.

12. Sri S. N. Bhuyan, learned Counsel for the petitioner, has further argued that the petitioner did not have the opportunity to cross-examine the Chemical Examiner on his report which resulted in grave prejudice to him. Sri Bhuyan has referred to the provisions of Section 293 and 294 of the Code, and the contention was that the provision of Section 294 cover the documents specified in Section 293 also. Section 293 of the Code is as under:

'293. Reports of certain Government scientific experts.-- (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any enquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

- (4) This section applies to the following Government scientific experts, namely:
- (a) any Chemical Examiner or Assistant Examiner to Government;
 - (b) the Chief Inspector of Explosives;
 - (c) the Director of the Finger Print Bureau;
 - (d) the Director, Haffkeine Institute, Bombay;
 - (e) the Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;
 - (f) the Serologist to the Government.'
- Section 294 of the Code reads:

'294. No formal proof of certain documents.--

(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.'

13. On careful consideration of the submission, I think the provisions of Section 293 are not controlled or regulated by the provisions under Section 294 of the Code. It may be noted that Section 293 was Section 510 in the old Code of 1898 and Section 294 has been inserted in the new Code which came into force on 1-1-74. The provision of Section 293 of the Code provides for reading in evidence certain documents which purport to be 'report' under the hand of a Government

scientific expert as enumerated in Sub-section (4) which include Chemical Examiner or Assistant Examiner to Government. The provisions of this section are intended to save time and avoid needless examination of experts mentioned therein, unless, of course, the Court found it necessary to examine the expert or when the accused requested for examination of the expert. In my opinion, if the Court does not find it necessary to examine the Chemical Examiner or any other expert mentioned in subsection (4) of Section 293 and the accused also does not make any prayer to summon and examine the expert the report can be used in evidence without examination of the expert, the Chemical Examiner in the instant case.

14. The provisions of Section 294 incorporated in the Code, were already in use in civil proceedings, i.e. where a document filed by a party was admitted by the opposite party or where the genuineness of a document was not denied by the opposite party, the document could without further proof be read and used in evidence. The practice in vogue in civil proceedings was introduced in the Code to save time and for convenience. In my opinion, the provisions of Section 294 do not control or regulate the provision of Section 293 of the Code. In the instant case, therefore, the Chemical Examiner's report which had been produced by the prosecution could be read in evidence without any formal proof by calling the Chemical Examiner as witness, more so when the Court did not think it necessary to examine the Chemical Examiner and the petitioner accused too did not make any prayer to summon the Chemical Examiner to cross-examine him. I, therefore, think that no irregularity much less any illegality was committed by the Courts below in taking into consideration the Chemical Examiner's report in evidence.

15. It may be noted that the Chemical Examiner's report is significant and of use only in regard to the illicitly distilled liquor, but in so far as the 'distilling apparatus' is concerned, the offence committed by the petitioner was not at all dependent on the report and consequently the above submission for the petitioner shall have no material effect so far as offence under Section 4 of the Act for possession of distilling apparatus was concerned and on the conviction and sentence recorded by the courts below.

16. Sri Bhuyan, learned counsel for the petitioner has finally submitted that the petitioner may not be sent to jail and he may be released on probation under Section 360 of the Code or under the Probation of Offenders Act.

17. Section 4 of the Act (Assam Liquor Prohibition Act, 1952) reads :

'Punishment of contravention. Whoever contravenes the provisions of Section 3 of this Act, shall be punished with imprisonment for a term which may extend to two years but not less than three months and also with fine which may extend to one thousand rupees but not less than one hundred rupees :

Provided that a person, who is under 21 years of age and against whom no previous conviction is proved, may be awarded a sentence of less than three months and a fine less than one hundred rupees for reasons to be recorded in the judgment that in consideration of the age, character and antecedents of the person concerned, a lesser sentence has been awarded.'

The provision prescribes minimum punishment of six months and fine. Considering that the petitioner was found in possession of the materials which clearly indicates that he was involved in manufacture of illicit liquor obviously for sale to others and thereby to make income for himself, the offence committed by him was grave and I am inclined to think that it is not a fit case in which the benefit of the provision of Section 360 of the Code or of the provisions of [Probation of Offenders Act, 1958](#) may be extended to the petitioner.

18. For the aforesaid reasons, this revision fails and is dismissed. The petitioner shall surrender and shall be sent to jail to serve out the sentence.

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