State Vs. Ramsingh Desasingh

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Court : Mumbai

Decided On : Mar-01-1962

Reported in : AIR1963Bom68; (1962)64BOMLR451; 1963CriLJ567; ILR1962Bom504

Judge : H.K. Chainani, C.J. and ;Tarkunde, J.

Acts : Bombay Prohibition Act, 1949 - Sections 66, 66(2), 129-A, 129-A(1) and 129-B

Appeal No. : Criminal Appeal No. 1511 of 1961

Appellant : State

Respondent : Ramsingh Desasingh

Advocate for Def. : R.M. Purandare, Adv.

Advocate for Pet/Ap. : Govt. Pleader

Judgement :

Chainani, C.J.

1. The facts giving rise to this appeal briefly are that on the evening of 8th December 1960 the accused wasarrested as he was suspected to have consumed alcohol.He was sent to the hospital for examination. The medicalofficer, who examined him, issued a Certificate Exh. 3, inwhich he has stated that the breath of

the accused smeltof liquor, that his pupils were dilated, that his eyes werecongested and that he had consumed liquor. The medicalofficer also collected some blood from the body of theaccused and sent it to the Chemical Analyser for examination. On 1-4-1961 the Chemical Analyser issued a certificate, that the blood contained 0.292 per cent. W/Vof ethyl alcohol. The accused was then prosecutedon the charge of consuming liquor and thereby committingan offence punishable under Section 66 of the Bombay Prohibition Act. In order to prove that the accused hadconsumed prohibited liquor, the prosecution relied on Sub-section (2) ot Section 66 of the Act, which states that, wherein any trial of an offence for the consumption of anintoxicant, it is alleged that the accused person consumedliquor, and it is proved that the concentration of alcoholin the blood of the accused person is not less than 0.05per cent, weight in volume, then the burden of provingthat the liquor consumed was a medicinal or toilet preparation, or an antiseptic preparation or solution, or aflavouring extract essence or syrup, containing alcohol,the consumption of which is not in contravention of theAct or any rules, regulations or orders made thereunder,shall be upon the accused person, and the Court shall inthe absence of such proof presume the contrary. Thepresumption referred to can be drawn under this sub-section, only if it is proved that the concentration of alcoholin the blood was not less than 0.05 per cent, by weightin volume. For the purpose of showing that the concentration of alcohol in the blood of the respondent accusedexceeded the quantity mentioned in Sub-section (2) ofSection 66, the prosecution relied on the Certificate of theChemical Analyser. Such a Certificate is admissible inevidence under Section 129B of the Act, The ChemicalAnalyser had in his Certificate not given the data or thereasons for coming to the conclusion that the accused'sblood contained 0.292% ethyl alcohol. The learned Magistrate was of the opinion that, in the absence of this information, he could not decide what weight should beattached to the opinion of the Chemical Analyser. He,therefore held that the prosecution had failed to establishthat the concentration of alcohol in the blood of the accusedwas not less than 0.55% and that, consequently,they could not rely upon the presumption under Section 66(2)of the Act, that the substance, which the accused hadconsumed, was prohibited liquor. He, therefore, acquittedthe accused. Against the order of acquittal the Statehas filed this appeal.

2. Sub-section (1) of Section 129A of the Act, provides that when any Police Officer has reasonable ground for believing that a person has consumed an intoxicant and that for the purpose of establishing that he has consume an intoxicant or for the procuring of evidence thereof, it is necessary that his body be medically examined, or that his blood be collected for being tested for determining the percentage of alcohol therein, such Police Officer may produce such person before a registered medical practitioner for the purpose of such medical examination or collection of blood, and request such registered medical practitioner to furnish a. Certificate on his finding whether such person has consumed any intoxicant and to forward the blood collected by him for test to the Chemical Examiner or Assistant Chemical Examiner to Government. Subsection (2) provides that the registered medical practitioner, before whom such person has been produced, shall examinesuch person and collect and forward in the manner prescribed the blood of such person, and furnish to the Officer, by whom such person has been produced a Certificate in the prescribed form containing the result of his examination; and that the Chemical Examiner or Assistant Chemical Examiner to Government, shall certify the result of the test of the blood forwarded to him, stating therein the percentage of alcohol and such other particulars as may be necessary or relevant. Section 129B states that any document purporting to be a Certificate under the hand of a registered medical practitioner, or the Chemical Examiner or Assistant Chemical Examiner to Government, under Section 129A, may be used as evidence of the facts stated in such Certificate in any proceedings under this Act, but that the Court may if it thinks fit, and shall, on the application of the prosecution or the accused person, summon and examine any such person, as to the subject-matter of his certificate. This section, therefore, makes a Certificate issued by a Chemical Examiner admissible in evidence. Ordinarily no Certificate issued by a person can be admitted in evidence, unless that person is examined as a witness. Section 129B, however, permits the Certificate issued by a Chemical Analyser being used as evidence in support of the facts stated therein, even though the Chemical Analyser has not been examined and has not given evidence. Consequently, if such a Certificate is produced by the prosecution, it must be admitted in evidence and must be treated as part of the evidence in the case even though the Chemical Analyser has not teen examined.

3. The next question to be considered is what weight should be attached to such a certificate, if the Chemical Analyser has not in his Certificate disclosed the factual data, on which his conclusion is based, or the reasons in support of his conclusion. This would depend on the facts of each case. The question, whether the concentration of alcohol in the blood of the accused person exceeded the limit specified in Sub-section (2) of Section 66, is for the Court to decide. In order to decide this question, the Court will take into consideration such evidence as may be produced before it. Section 129B only authorises the facts mentioned in the Certificate issued by the Chemical Examiner being proved by the production of that certificate. It does not say that the Certificate shall be conclusive proof of the facts stated therein. If the only evidence before the Court is the Certificate of the Chemical Analyser, and if that Certificate is not challenged, it would be open to the Court to accept that evidence and draw the presumption referred to in Sub-section (2) of Section 66. It cannot, however, refuse to consider the evidence furnished by the certificate, merely because it does not mention the data, on the basis of which the Chemical Analyser arrived at the percentage of alcohol mentioned in his certificate, or because he has not given (he reasons for his conclusion. If the Court feels that it should have more information in order to satisfy itself about the correctness or otherwise of the certificate, the Court should summon the Chemical Analyser or ash the prosecution to summon and examine him. But without examining the Chemical Analyser, the Court would not be justified in holding that the charge against the accused has not been proved, merely because the Certificate issued by the Chemical Analyser only mentions the percentage of alcohol found in the blood of the accused and does not give any other particulars.

4. The learned Magistrate, has relied on the decision of a single Judge of the Gujarat High court in Suleman Usman Memon v. State of Gujarat, : AIR1961 Guj120 in which the learned Judge has observed that, unless the evidence is given on oath and is tested by cross-examination, it is not legally admissible against the party affected, and that if the report of the Chemical Analyser as to the alcoholic content of the blood of the accused does not show the tests or experiments performed by him, the factual data revealed by such tests or experiments and the reasons leading to the formation of his opinion from such factual data, then the Court cannot accept It as a piece of evidence. With respect,

we are unable to agree with this view of the learned Judge. Section 129B in terms makes a Certificate issued by the Chemical Examiner admissible in evidence even though the officer, who issued that certificate, has not been examined in Court, and even though the opinion expressed by him has not been tested by cross-examination. There is also no provision of law, which requires that the evidence furnished by the Certificate of the Chemical Analyser cannot be acted upon, unless the Certificate also gives particulars about the tests or experiments performed by the Chemical Analyser and the reasons, which led him to form the opinion expressed in his certificate. If, therefore the correctness of the opinion expressed by the Chemical Analyser in this Certificate is not challenged by the accused, and if the Court sees no sufficient reason for not accepting that opinion, it would be open to the Court to act upon the certificate.

5. Mr. Purandare has referred us to the decision of this Court in Emperor v. Behram Sheriar Irani, 46 Bom LR 481 : AIR 1944 Bom 321. In that case, it was observed that the weight to be attached to a report of the Chemical Analyser, which is used as evidence without the Officer being called as a witness, must depend to a considerable extent on the reasons given by the Chemical Analyser for the conclusion arrived at by him. It was, further observed that, if the Chemical Analyser's report alone is to be considered sufficient, it should contain all the information, which that officer himself would have been able to furnish, if he had been examined as a witness. In that case, the proprietor of 3 bakery was charged with using wheat flour or wheat products for the preparation of cakes. The Chemical Analyser's report only showed that in two cakes out of about 3,000 cakes, which had been attached from the bakery of the accused, wheat products had been found, and the report did not show what quantity of wheat products had been found in the cakes. The defence of the accused was that there might have been a small quantity of wheat products in the baking powder used by him in the manufacture of the cakes. This defence of the accused could not be said to be untrue in the absence of any mention in the Chemical Analyser's report about the quantity of wheat products found by him in the cakes examined. It was, therefore, observed that in such cases, where the matter to be reported is the presence of a certain substance in the articles detained for examination, much depends upon the quantity of the incriminating substance found in the articles, and that if the

Chemical Analyser's report alone is to be considered sufficient, it should contain all the information, which that officer himself would have been able to furnish, if he had been examined as a witness. We do not interpret this decision as laying down that in all cases the Chemical Analyser's report must contain all the Information, which he may be able to furnish, if he is examined as a witness. The view, which we are taking, is in accordance with the view which Mr. Justice Abhyankar and myself tock in Criminal Appeal No. 1285 of 1961, State v. Dashrath A. Badade, D/-9-12-1961.

6. In out opinion, therefore, the learned Magistratewas wrong in acquitting the accused. The learned Government Pleader has, however, informed us that he has filedthis appeal mainly in order to get a decision in regardto the view taken by the learned Magistrate as regardsthe admissibility of the Certificate of the Chemical Analyserand the weight to be attached to it. The offence Wasalso committed by the accused about 15 months ago. Wedo not, therefore, propose to set aside the order ofacquittal and send back the case for retrial. We will,therefore, not interfere with the order passed by the learned Magistrate.

7. Order accordingly.