

Emperor Vs. Kisan Narayan

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Court : Mumbai

Decided On : Nov-30-1949

Reported in : AIR1951Bom186; (1950)52BOMLR280; 1952CriLJ41

Judge : Rajadhyaksha and ;Chainani, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 103, 367 and 537;
[Bombay Abkari Act, 1878](#) - Sections 43(1)

Appeal No. : Criminal Appeal No. 604 of 1949

Appellant : Emperor

Respondent : Kisan Narayan

Advocate for Def. : J.R. Desai, Adv.

Advocate for Pet/Ap. : H.M. Choksi, Government Pleader

Judgement :

Chainani, J.

1. This is an appeal by the Government of Bombay against the acquittal of two accused persons who had been charged with having committed offences punishable under Clauses (a), (b) and (h) of Section 43 (1) of the Bombay Abkari Act. The facts of the case briefly are that on 7th July 1948, Sub-Inspector D'Souza

was on patrol duty at Dharavi Creek along with two Police Constables. He noticed smoke from a distance, got into a toney and went to the place from which smoke was coming. He then saw accused 2 attending to a still. Accused 1 was sitting about 20 feet away from the still. Both the accused tried to run away, but they were chased and arrested. The still and other articles used for manufacturing liquor were seized. The two accused were then sent for trial. The prosecution examined the Sub-Inspector, D'Souza, and a Police Constable, Gangaram, who had accompanied him in order to prove the above facts. Both the accused pleaded not guilty. They stated that they were fishermen who had gone to Dharavi Creek for fishing and that they had been arrested by the Police on suspicion. The learned Magistrate did not disbelieve the evidence given by the two Police officers, but he acquitted the accused on the ground that their evidence had not been corroborated by any other independent and reliable evidence. The Government of Bombay have appealed against the order acquitting the two accused.

2. In acquitting the accused, the learned Magistrate had presumably in mind our judgment in *Emperor v. Sukhrubai*, Cri. App. No. 748 of 1948, D/- 10-2-1949 by Rajadhyaksha J. In that case a small island near Bombay was raided after the receipt of information about the commission of an offence under the Abkari Act. A hut on the island was searched and a still was found therein. The search was not held in the presence of the Panchas as required by law and no panchnama was made. The accused denied that he was working any still. The only evidence about the finding of the still was that of the investigating officers. The Magistrate convicted the accused, and in appeal we set aside the conviction. The ground for our acquitting the accused was that the law required that the evidence of investigation officers in such cases should be corroborated by other independent evidence and that that corroboration, which could have been made available by making the search in the manner prescribed by law, was not forthcoming.

3. In our judgment, we observed :

'Having regard to the fact that in cases of this kind allegations are frequently made that the incriminating articles have been planted, we do not think that it would be desirable to normally base a conviction solely on the evidence of the investigating

officer.'

These observations must be read in the context of the case which was then before us. What we meant was that Court should be slow to act on the uncorroborated testimony of investigating officers in regard to property discovered by them on making a search, when under the law such a search must be made in the presence of two independent and respectable persons. For, as observed by Das J. in *Lachmi Narain v. Emperor* : AIR1919 Pat452 :

'It is with some object that the Legislature has provided safeguards and when they are deliberately broken it is, in our opinion, not for the accused to show that they have been prejudiced. The prejudice is in our opinion, on the face of the record. They should not have entered the premises without search witnesses, the object being that it may not be in their power to smuggle articles into the house and bolster up a false case against them.'

The view taken by us is in accordance with that taken by another Bench of this Court in *Shanwar Manu Koli v. Emperor* , : AIR1950 Bom267 . In *Emperor v. Mohanlal Bababhai* 43 Bom. L. R. 163 : A. I. R. 1941 Bom. 149 : 42 Cr. L. J, 556), a panchnama about the identification parade was proved by the police officer who had held the parade. It was held that the panchnama had been improperly admitted in evidence, and the conviction of the accused was set aside. In his judgment, Beaumont C. J. observed (p. 166) :

'The object of having panch witnesses is to provide evidence which is independent of the police. . . . Apart from searches, it is, of course, not a rule of law or practice that police evidence must be corroborated; but where one is dealing with an identification parade, and where it is of vital consequence to show that the accused was duly identified, it is obviously desirable, as the police recognize themselves, to have some independent evidence that the parade was properly and fairly held I am not prepared to act on the uncorroborated testimony of the police officer as to what took place at this identification parade, particularly as evidence in corroboration was available and not called.' These remarks would apply with equal force in cases in which property is discovered after making a search which, under the law, must be made in the presence of panchas.

4. It may also be noted that our observations were not intended to apply in all cases in which there had been a failure to observe the provisions of law with regard to searches. We deliberately used the word 'normally,' as we contemplated cases in which circumstances may render it impossible to comply with those provisions. In such cases the evidence about the finding of property will be that of the police officers only. The police officers are competent witnesses and their evidence cannot be rejected merely because they are police officers. Their evidence must, however, be carefully examined and scrutinized, particularly when an allegation is made that the articles had been planted. But if after exercising due care and caution, the Court comes to the conclusion that it can safely be acted upon, it can proceed to act on it and convict the accused.

5. The position may be summed up thus. Where the law requires that the search should be made in the presence of the panchas, a panchnama should usually be insisted upon and the conviction should not ordinarily be based on the uncorroborated testimony of police officers. For corroboration of their evidence, which under the law must be made available, is not forthcoming. Where, however, it is not possible to make a search in the presence of the Panchas or where property is found without a search being made, e. g., where a person is seen carrying a bottle of liquor in his hands, or where under the law it is not obligatory to make a panchnama, it would be open to the Court to convict the accused on the evidence of police officers alone, if after examining that evidence carefully the Court feels satisfied that it is true.

6. So far as the present case is concerned, the learned Government Pleader has argued that under the provisions of the Bombay Abkari Act, it is not necessary to make a search of an open place in the presence of the Panchas. In our opinion, it is possible to take the other view that if a search is to be made for articles which are concealed in an open place, e. g., underground, it must be made in the presence of the panchas. It is, however, not necessary to decide this point in this appeal, for the evidence shows that accused 2 was seen attending to a still, while accused 1 was seen sitting about 20 feet away from the still. The question whether the two accused were seen in the manner stated above can only be decided by reference to the evidence of the two police officers who then saw them. No search

was necessary for this purpose and no panchnama was, therefore, required to be made. There is no particular reason why the; evidence of the two police officers, Sub-Inspector D'Souza and constable Gangaram, should not be believed. Their evidence shows that accused 2 was attending to a working still. Relying on this evidence, we find accused 2 guilty of the offences punishable under Clauses (a), (b) and (h) of Section 43 (1), Bombay Abkari Act.

7. As regards the sentence, accused 2 is a young boy of about 17-18 years of age and has no previous conviction. A fine of Rs. 50 will, therefore, in our opinion, be sufficient to meet the ends of justice. We accordingly convict accused 2 under Clauses (a), (b) and (h) of Section 43(1), Bombay Ahkari Act, and sentence him to pay a fine of Rs. 50 for the offence punishable under Clause (b) of Section 43 (1). In default of payment of fine, accused 2 should undergo two weeks' rigorous imprisonment. We pass no separate sentences for the offences punishable under Clauses (a) and (h) of Section 43 (1) in view of the provisions of Section 71, Penal Code.

8. So far as accused 1 is concerned, his case is different. All that the evidence shows is that he was sitting about 20 feet away from accused 2. He was not seen assisting accused 2 in working the still, nor were any incriminating articles found in his possession. In our opinion, therefore, accused 1 cannot be held to have committed any offence under the Bombay Abkari Act. The appeal with regard to this accused 1 will, therefore, be dismissed.

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