

Emperor Vs. Mahomed Bashir

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Court : Mumbai

Decided On : Aug-14-1945

Reported in : AIR1946Bom315; (1946)48BOMLR46

Judge : Divatia and ;Bavdekar, JJ.

Appeal No. : Criminal Revisional Application No. 335 of 1945

Appellant : Emperor

Respondent : Mahomed Bashir

Judgement :

Divatia, J.

1. This is an application by accused Nos. 1 and 2 who were convicted by the Presidency Magistrate, 2nd Additional Court, Mazagaon, Bombay, for the offence under rule 81(4) of the Defence of India Rules read with the Commissioner of Police's Notification No. 14824/123-C dated September, 12, 1944. Accused No. 1 is the proprietor of a hotel called Islami Hotel at the corner of Grant Road in Bombay, and accused No. 2 is a manager of the hotel employed by the first accused. The hotel served refreshments consisting of food and non-alcoholic drinks to customers by virtue of a licence issued to accused No. 1 in 1941 and renewed from year to year. The charge against the two accused was that they on December 16, 1944, kept their hotel open between the hours of 1 A.M. and 5 A.M.

and did sell or supply for consumption on their premises food or drinks to customers and aided and abetted each other in doing so and thereby committed an offence punishable under rule 81(4) read with rule 121 of the Defence of India Rules and the above-mentioned notification. That notification was issued under rule 81, Sub-rule (2), Clause (a), and it directed that from September 20; 1944, no article of food or drink shall be sold or supplied for consumption between the hours of 11 P.M. and 5 A.M. at any place of entertainment in the City of Bombay except under and in conformity with the conditions of a special permit granted by the Police. The notification was issued on September 12, and it appears that such special permit was issued to the first accused on September 18, authorising him to keep open the said hotel for selling or supplying for consumption articles of food or drink after 11 P.M. up to 1 A.M. As a result of this special permit the accused were entitled to keep their hotel open from 5 A.M. to 1 A.M. on the next morning. The prosecution case was that a bogus customer was sent to the accused's hotel at about 12-50 A.M. and he and other customers were supplied with food after 1 A.M. Thereafter the police raided the hotel and found 31 customers eating and drinking in the hotel. Accused No. 2, i.e. the manager, was standing near the till. A panchanama was made of the things found in possession of the accused which included marked notes which were given to the bogus punter. The panchnama was begun at 1-45 A.M. and concluded at 2 A.M. Thereafter the accused were charged with the infringement of the terms of the notification under Rule 81(4) of the Defence of India Rules. The bogus customer died after hearing of the case commenced, but the prosecution examined the panch witness, Deputy Inspector Soloman, and Sub-Inspector Khadkei who had taken part in the raid.

2. The learned Magistrate was satisfied on the evidence that about 30 customers were taking food in the hotel after 1 A.M. On behalf of accused No. 1, the proprietor, it was urged that he was admittedly not present in the hotel at the time of the raid and; he had left the entire management of the hotel in the hands of accused No. 2 and another manager, that he came to the hotel after the raid was over and that the licence was given to the hotel and not to accused No. 1 personally. The learned Magistrate was of the opinion that for the offence under Rule 81(4) of the Defence of India Rules it was not necessary that there must be a guilty intention in the mind of the person charged, that it was sufficient if accused

No. 1 was the proprietor of the hotel and that his servants committed the offence. The liability of the master for the crime of the servant was to be implied from the very nature of the offence created by that rule. He, therefore, held both the accused liable for the offence and convicted them and sentenced accused No. 1 to pay a fine of Rs. 25 and accused No. 2 to pay a fine of Rs. 75. Both the accused have come to this Court in revision.

3. Mr. Mehta on behalf of the petitioners has urged two points before us. The first point is that the offence with which the accused are charged is really the infringement of the terms of the licence and not the infringement of the Defence of India Rules. His first contention is that the licence was given to the first accused in 1941 at which time the old standard time was in existence, and at the time when the accused was charged the new (standard time had come into force which was one hour in advance of the old standard time. The hours of business originally mentioned in the licence were 5 in the morning to 11 P.M. standard time. The licence was renewed from time to time up to March 31, 1945. As the original licence was given under the old standard time, the renewal of the hours of business from time to time must also be considered to be under the old standard time even though the licence was renewed after the introduction of the new standard time, It is further urged that even under the special permit, which was issued in 1944, the time of 11 P.M. which was extended to 1 A.M. must also be read in reference to the old standard time because the time which was mentioned in the licence was extended by the special permit, and therefore the standard of time must be regarded as the same as it was when the original licence was issued. It was contended on that ground that 1 A.M. mentioned in the special permit would be 2 A.M. according to the present standard time, and that being so, no offence was committed because it has not been found that any food or drink was supplied to any customer after 2 A.M. on that night. It is no doubt true that the licence was issued at the time when the old standard time was in force. It is, however, quite clear that the special permit was given in 1944 at a time when the new standard time was in force and after the issue of the notification on September 12. That notification read with the special permit prescribes, so far as the present accused are concerned, the hours of business between 5 A.M. and 1 A.M., and in the absence of any specific mention, it must be taken that the hours

of business which are referred to in the notification must be the hours under the new standard time which was in force at that time and not under the old standard time. In our opinion, therefore, the time mentioned in the notification as well as the time mentioned in the special permit must be the new time which was then in force. The mere fact that the licence was continued from 1944 to 1945 without changing the nature of the standard time does not necessarily mean that even when the special permit was granted the time was intended to be the old standard time and not the new one. In our opinion, therefore, that argument is without any substance, and it must be taken that the customers were found in the hotel between 1 A.M. and 2 A.M. according to the new standard time.

4. The second argument about the liability of accused No. 1 has some importance in law because there does not seem to be any authority on this point under the Defence of India Rules. It is common ground that accused No. 1, though the proprietor of the hotel, was not taking any active part in its management, and had left the management in the hands of two managers whose names were endorsed on the licence. He was also not present at the time when the raid took place, and his case is that he had not authorised the managers to keep the hotel open after the hours mentioned in the licence and the special permit. The question is whether accused No. 1, the master, is liable for the criminal act of his servant, accused No. 2. No doubt under the ordinary rule of law a master is not criminally liable for the acts of his servant, but there are certain well recognized exceptions to that rule, and in our opinion the present case falls under the exception and not under the general rule. A number of cases has been referred to by Mr. Mehta on this point. It is not necessary to refer to all of them. It is sufficient to say that the effect of the authorities has been summarized in Halsbury's Laws of England, Hailsham Edition, Vol. XXII, p. 232, Article 412, where the cases of the liability of the masters for the crimes of their servants are divided into four classes. The first class consists of cases where the statute might make the master liable for his servant's act) in any event. In that case it was only necessary to show that the act was done by the servant in the course of his employment and within the scope of his general authority, and the liability of the master arose solely from his relation to the servant, and the absence of personal guilt was immaterial. The second class consists of cases where the statute; might make the master liable for his servant's

act unless he could prove that he himself was not in default. The third class consists of cases where the statute might make the master liable for his servant's act only if the prosecution proved affirmatively that he knew, either actually or constructively, of the servant's act or that he connived at its commission. The fourth class consists of cases where, the statute might make the master liable, not for his servant's act, but only for his own. Under the first class the leading cases are *Mullins v. Collins* (1874) L.R. 9 Q.B. 292 *Coppen v. Moore* (No. 2) [1898] 2 Q.B. 306, *Parker v. Alder* [1889] 1 Q. B. 20, and the latest case of *Allen v. Whitehead* [1930] 1 K.B. 211. In the last of these cases the law has been summarized and it is observed, quoting from the case of *Mousell Brothers v. London and North Western Railway* [1917] 2 K.B. 836, as follows (p. 220):-

I think that the authorities cited by my Lord make it plain that while *prime facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and) the person upon whom the penalty is imposed.

On the facts of that case it was held, that looking to the object of the statute, viz. the Metropolitan Police Act, the master was liable for the crime of his servant even though he was not aware of the offence committed by him.

5. Mr. Mehta contends that the liability of the accused, if any, was under the licence, and not under the Defence of India Rules. But, in our opinion, although the basis of the liability is the conditions mentioned in the licence itself, the penalty for the infringement of the terms of the licence is provided in the Defence of India Rules. Reading Rules 81(2) and 81(4) together, it follows that the notification, which is issued under r; 81(2), enjoins the accused not to keep the hotel open after 1 A.M., and for a breach of the terms of the notification the penalty is provided in Rule 81(4). It cannot be said, therefore, that the liability of the accused is only

under the licence and not under the Defence of India Rules. If, therefore, the infringement is not merely of the terms of the licence:but that of the terms of the notification issued under the Defence of India Rules, we have to see as to what the object of the Legislature was. In a very recent case, (Mangat Ram v. Emperor Since reported in A.I.R [1945] A.I.R. Lah. 281) which is still not reported, of a full bench of the Lahore High Court the whole law, English as well as Indian, on this point has been exhaustively discussed by their Lordships. That was no doubt a case under the Hoarding and Profiteering Prevention Ordinance, and the question was ' Whether a servant, be he a salesman or a manager, is covered by the term ' dealer' as used in the Ordinance ' ?

6. The point which they had to decide was whether the proprietor of the shop was liable for the crime of his servant, which is exactly the question to be decided in the present case. No doubt that case was under the Hoarding and Profiteering Prevention Ordinance, while the present case is under Rule 81 of the Defence of India Rules. In our opinion, however, that does not make any difference so far as the object of the Legislature is concerned. Just as the object of that Ordinance is to conserve the stocks of various articles for their proper distribution among the consumers, so also the object of the present notification issued under Rule 81(2) is the preservation and proper distribution of articles of food by prohibiting their sale or Supply after a certain hour at night. The object, therefore, of both these pieces of legislation seems to us to be the same, and therefore, the decision in the full bench case would, in our opinion, apply to the facts of the present case also. Their Lordships of the Lahore High Court, after an exhaustive discussion of the point before them, came to the conclusion that the case fell under the first class of cases mentioned in Halsbury's Laws of England, because looking to the object for which the statute was enacted, it ought to be construed not merely with reference to its language, but also its subject-matter and object. We agree with the decision which the full bench arrived at in that case, particularly because we find that our High Court has also taken the same view in several reported decisions. The first of these decisions is in Queen-Empress v. Tyab Alii I.L.R (1900) Bom. 423: 2 Bom. L.R. 52. That was a case under the Arms Act, and it was also a case of infringement of the terms of the licence issued under that Act. It was held that where the manager of a licensed vendor of arms, ammunition and military stores

sold certain military stores without previously ascertaining that the buyer was legally authorised to possess the same, the licensee was liable to punishment under Section 22 of the Arms Act, though the goods were not sold with his knowledge and consent. The leading cases of *Mullins v. Collins* (1874) L.R. 9 Q.B. 292 and *Coppen v. Moore* (No 2) (1898) 2 Q.B. 306, referred to by the above, were followed. The next case is *Emperor v. Jeevanji* I.L.R (1907) Bom. 611: 9 Bom. L.R. 967. That was a case under the Indian Emigration Act, and it was held, following the English case law, as follows (p. 627):-

Where a penal statute has been infringed by servants and criminal proceedings are taken against the master, although it lies upon the prosecutor to establish the master's liability, yet the question whether he is liable turns necessarily upon what is the true construction to be placed upon the statute, ... The Statute should be construed, not merely with reference to its language, but also its: subject-matter and object.

7. The third case is *Emperor v. Makadewappa* I.L.R (1926) 1 Bom. 352: 29 Bom. L.R. 153. That was also a case of infringement of the terms of a licence granted under the Indian Explosives Act. There it was held by majority of the Judges that the principle of English law enunciated in *Emperor v. Jeevanji* was applicable to the case of a crime committed by a servant in breach of the licence granted under the Indian Explosives Act, and that the master was also liable even though he had no knowledge of the crime committed.

8. It is true that none of these cases was under the Defence of India Rules. In our opinion, however, that principle is much more applicable in a case coming under an emergency legislation, whether it is an ordinance or it is a notification issued under the Defence of India Rules.

9. Mr. Mehta has further contended that the language of the notification is different from the language of the statutes which have been the subject-matter of judicial decisions in the English as well as Indian cases. Whereas all these statutes run to the effect that 'No person shall do', in the present case the notification is worded in the passive voice and it says that 'No article of food or drink shall be sold or supplied for consumption ...' His contention is that what is prohibited is the sale of

any article of food or drink, and that the liability is sought to be attached to the person who actually sells it and not necessarily to the owner or proprietor of the establishment. In our opinion, in spite of this difference between the language of the statutes and the notification in the present case, the prohibition of sale is absolute in both cases. It is true that in the statutes stress is laid on the person whereas in the notification stress is laid on the article of food or drink. But both of them are absolute in their nature inasmuch as no article of food or drink can be sold by any person. The object, as I said before, was that there should be preservation and proper distribution of the articles of food and drink to the members of the public. If the object is the same in the Hoarding and Profiteering Prevention Ordinance where the language is in the active form and not in the passive form and where also the master is liable for the criminal act of his servant, we do not see any reason why the master should not be held liable for the criminal act of his servant in a case where the notification is worded in the passive form and not in) the active form. We are, therefore, dearly of the opinion that the present case comes within the exception to the general rule that a master is not liable for the criminal act of his servant. That being so, the conviction of the first accused for the offence under Rule 81(4) is, in our opinion, correct.

10. It was lastly contended by Mr. Mehta that accused No. 1 was charged under Rule 121 of the Defence of India Rules which applies to cases of attempt or abetment, and that abetment necessarily implies; an intention on the (part of the doer of the act In our opinion, the charge is not limited to the offence under Rule 121. Accused No., 1 is charged with the principal offence under rule 81(4), and in the alternative of the offence under rule 121. If he is guilty of the principal offence, the question of his liability for the alternative offence would not arise.

11. For these reasons We confirm the convictions as well as the sentences of both the accused, and discharge the rule.