

State Vs. Trimbak Dhondu Bhoir

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Court : Mumbai

Decided On : Apr-11-1955

Reported in : (1955)57BOMLR541

Judge : M.C. Chagla, C.J. and; Desai, J.

Appeal No. : Criminal Appeal No. 130 of 1955

Appellant : State

Respondent : Trimbak Dhondu Bhoir

Judgement :

M.C. Chagla, C.J.

1. A rather important question under the Bombay Prohibition Act arises in this appeal which is preferred by the State against acquittal of the accused by the Sessions Judge, Thana, The accused was charged under Section 85(1)(3) of the Prohibition Act and he was convicted by the Judicial Magistrate, First Class, to 1 day's simple imprisonment and to pay a fine of Rs. 50, in default simple imprisonment for one week. The accused appealed and the Sessions Judge acquitted the accused. The State has preferred this appeal, as according to the State, it raises a principle and also an important question of the interpretation of Section 85(2)(3) of the Bombay Prohibition Act.

2. Section 85, as the marginal note indicates, deals with the penalty for being drunk and for disorderly behaviour and Sub-section 1 of that section provides:

Whoever in any street or thoroughfare or public place or in any place to which the public have or are permitted to have access-

(1) is drunk and incapable of taking care of himself, or

(2) behaves in a disorderly manner under the influence of drink, or

(3) is found drunk but who is not the holder of permit granted under the provisions of this Act or is not eligible to hold a permit under Section 40, 41 or 46....

3. The Only evidence in this case on which the conviction by the learned Judicial Magistrate was based was that the accused was found smelling of drink. The learned Sessions Judge took the view that Sub-section (3) of Section 85 only applies to a case where a person has drunk prohibited liquor. He further took the view that in view of the recent decision of the Supreme Court, the burden was upon the prosecution to establish that the accused had drunk prohibited liquor, and inasmuch as that burden was not discharged, the accused could not be convicted of an offence under Sub-section (3) of Section 85 of the Act. The question, therefore, that we have to consider is whether under Section 85(7)(3) a person can only commit an offence provided he drinks a prohibited liquor and would not be guilty of any offence if he drinks permitted liquor.

4. Before we construe Section 85, it may be perhaps both important and interesting to look at the history of legislation with regard to intoxication. Intoxication by itself was never an offence before the Prohibition Act was passed. If there were other circumstances or factors besides intoxication, then the law punished not so much the fact of drunkenness as the results produced by drunkenness and therefore we find that under the Penal Code under Section 510 what is punished is not the fact that a person in a state of intoxication appears in any public place, but being in a state of intoxication and appearing in any public place and further conducting himself in such a manner as to cause annoyance to any person. Therefore as far as the Penal Code is concerned, if a person appears

in a public place intoxicated and does not cause any annoyance to anyone, he would not be guilty of any offence. The same was the position with both the District Police Act and the Bombay Police Act before the Prohibition Act was passed. Under Section 61AA of the District Police Act which was repealed by the Prohibition Act, what was constituted an offence was a person being drunk and incapable of taking care of himself or behaving in a disorderly manner under the influence of liquor and there was a similar provision in Section 122-A of the City Police Act. Therefore it will be noticed that under both these Police Acts what was made punishable was not drinking as such or even drunk as such, but the commission of certain acts which resulted from a person being drunk.

5. In Section 85 of the Prohibition Act as far as Sub-sections (1) and (2) are concerned, the same policy of the law has been maintained, because under Sub-section (1) what is punishable is being drunk and incapable of taking care of himself and under Sub-section (2) what is made punishable is behaving in a disorderly manner which is the result of drinking. But what creates a difficulty is proper interpretation of Sub-section (3), because under that sub-section for the first time the Legislature is aiming to punish either the effect of drinking or intoxication although' neither the one nor the other may produce any harmful results.

6. The Advocate General at first attempted to argue that under Sub-section (3) of Section 85(1) if a person drank a permitted alcohol and went into a public street, that by itself was sufficient to constitute an offence. The startling argument was put forward that even if the most honest and most law abiding citizen drank a medicine which contained alcohol, which had been prescribed by a doctor and which he was permitted under the law to take and if after taking that medicine he had the misfortune to go out on a public road, he would be committing an offence under Sub-section (3) of Section 85(1), because what was sought to be argued was that 'drunk' must be construed in the light of the definition given in Section 2(12) of the expression 'to drink', and it was pointed out that the expression 'to drink' was defined with grammatical variations and what was seriously argued was that the expression 'drunk' was nothing more than a grammatical variation of the expression 'to drink'. It is precisely because this argument was advanced before

the Sessions Judge that the Sessions Judge had to consider the effect of the qualifying expression used after the expression 'is found drunk' in Section 85(3) and the qualifying expression is 'but who is not the holder of permit granted under the provisions of this Act or is not eligible to hold a permit under Section 40, 41 or 46', and the view taken by the learned Judge was that this section only applied to a person who drank a prohibited liquor without having a permit for it. Therefore, according to the learned Sessions Judge, the mere drinking of liquor was made punishable only in that limited class of cases where a person drank prohibited liquor without having a permit. The learned Sessions Judge refused to accept the contention which was originally put forward by the Advocate General that even when a person drank permitted liquor and was perfectly sober but went out to a street or to a public place, he would be guilty of an offence which it should be noted, if it was a first offence was punishable with a minimum sentence of 7 days' imprisonment and if it was a second offence it was punishable with a minimum sentence of one month. In our opinion it is impossible to accept the contention of the Advocate General as it was first pressed that the expression 'drunk' in Sub-section (3) of Section 85(1) is synonymous with the expression 'to drink'. The definition section, Section 2 expressly provides that these definitions are to apply unless there is anything repugnant in the subject or context and as we shall presently point out it is repugnant to the context of this sub-section to construe the expression 'drunk' in the light of the definition given of the expression 'to drink'. In our opinion it is necessary in this context to give to the expression 'drunk' its plain natural meaning which it has in the English language.

7. The Shorter Oxford Dictionary defines 'Drunk' as overcome by alcoholic liquor or intoxicated. In our opinion it is necessary to keep before one's mind the essential distinction between drinking and getting drunk. It is not every act of drinking that necessarily results in drunkenness. It would depend upon the quantity drunk, the constitution of the person who drinks, his mental and physical condition at the time he consumes liquor. It is also a sound canon of construction not to attribute to the Legislature any legislation which is unreasonable, and it would seem strange indeed that the Legislature having permitted a person to drink liquor which is not prohibited in the shape of a medicine or a tonic should punish him because having drunk he should leave his home and be in a public place although

he may not commit any act which may be considered objectionable from any point of view.

8. The Advocate General relied on Sub-section (2) of Section 85. Now that sub-section introduces a rule of evidence and in the first place in our opinion it is not proper to construe Sub-section (3) and to determine what the ingredients of an offence are by construing the rule of evidence introduced by the Legislature. It may also be pointed out that this rule of evidence was introduced subsequently by amending Act XXVI of 1952. That Sub-section (2) is in the following terms:

In prosecution for an offence under Sub-section (1), it shall be presumed until the contrary is proved that the person accused of the said offence has drunk liquor or consumed any other intoxicant for the purpose of being intoxicated and not for a medicinal purpose.

Now if the ingredient of the offence under Sub-section (3) is the mere fact of drinking and being in a public place, then it is difficult to understand how this rule of evidence can have any application whatsoever. The intention of the drinker is irrelevant if the mere act of drinking has been constituted an offence. This rule of evidence, as we shall later point out, can only have application if we construe Sub-section (3) in the way we are suggesting and give to the expression 'drunk' its plain natural meaning. It was also urged by counsel appearing for the accused that the judgment of the Supreme Court in *State of Bombay v. F.N. Balsara* : [1951]2SCR682, s.c. has given a restricted meaning to the expression 'drunk' and it is urged that according to that decision we must construe the expression 'drunk' in Section 85 as only meaning drinking prohibited liquor. Now the decision of the Supreme Court on this point is extremely clear. The Supreme Court differed from the view taken by this Court in holding that the definition of liquor in Section 2(24) was partly ultra vires the Legislature. But the Supreme Court upheld the view of this Court in deciding that under Sections 12 and 13 of the Act to prevent a person from importing or exporting or transporting or using or possessing or consuming toilet or medicinal preparations was an unreasonable restriction on the fundamental right of the citizen under Article 19(7). Therefore what the Supreme Court held was, confining ourselves to the question of consumption, that to

prevent a citizen from consuming a medicinal preparation would be contravening his fundamental right under the Article 19(1)(f). It will, therefore, be noticed that the decision of the Supreme Court did not turn on the vires of the Legislature but on considering a particular specific restriction imposed upon the right of the citizen. Therefore if we were to apply the decision of the Supreme Court to a consideration of Section 85, what we have to consider is whether it could be said that the Legislature has imposed an unreasonable restriction upon the right of the citizen in prohibiting him from being drunk in the sense in which we propose to consider that section. The answer to that question is obvious. The offences constituted under Sub-sections (1), (2) and (3) of Section 85(1) are all against public interest and the restrictions imposed by the Legislature in our opinion are perfectly reasonable. Therefore we see no reason why we should limit the meaning of the expression 'drunk' in Section 85(1) to a case where a person drinks prohibited liquor. In our opinion also there is no analogy whatever between the construction of Sections 12 and 13 and the construction of Section 85 from the point of fundamental rights.

9. Having made these observations, perhaps it would be better if we now sum up what our decision is and what is the effect of this decision on the construction of the various material sections in the Prohibition Act. There is no difficulty with regard to Sub-sections (1) and (2) of Section 85. If a person is drunk and incapable of taking care of himself or if a person behaves in a disorderly manner under the influence of drink, the facts that go to constitute these offences can be easily established and no difficulty would arise with regard to those, facts. But when we go to Sub-section (3), as we have already pointed out, this is the first time that the Legislature has made intoxication by itself an offence. Now it is in very rare cases that a case which does not fall under Section 85(1)(2), or 85(1)(2) would fall under Sub-clause (3). Ordinarily when a person is intoxicated, he is either incapable of taking care of himself or behaving in a disorderly manner. But we grant that there may be cases of intoxication which may not fall under Sub-sections (1) and (2) but may still fall under Sub-clause(3). But in order that a person can be held guilty to be drunk, it is not sufficient that he should merely smell of alcohol. As we pointed out the definition of 'drunk' requires that he should be overcome by alcohol or be intoxicated. Therefore as a result of drink, he must not be his normal self. There must be some evidence produced by the prosecution

beyond the fact of his having drunk alcohol, thereby smelling of alcohol which would induce the Court to hold that he is overcome by drink or is in a state of intoxication. If a person has been proved to have committed any act which falls under Sub-sections (1), (2) and (3) of Section 85(7), it may still be open to him under Sub-section (2) to prove that he consumed liquor not for the purpose of being intoxicated but for a medicinal purpose. It may happen that a person may bona fide and under medical advice take a medicine containing alcohol and it may also happen, though it may be very rare, that such medicine may go to his head and may lead to a state of intoxication. In the circumstances like these, it would be open to the accused to rebut the presumption which the Legislature has raised under Sub-section (2) of Section 85. It may be pointed out here that Sub-section (2) itself gives an indication of the meaning to be attached to the expression 'drunk', because the presumption that is raised is that the liquor was consumed for the purpose of being intoxicated and not for a medicinal purpose. Therefore under Sub-section (2) also the Legislature is emphasizing the fact that liquor is consumed for the purpose of intoxication and is not emphasizing the mere act of drinking.

10. With regard to the recent Supreme Court decision that the burden lies upon the prosecution to establish that the liquor drunk is prohibited liquor and not permitted liquor, the question of that burden only arises when a person is prosecuted under Section 66(b), because under that section read with Section 13(6) the mere fact of consumption has been made an offence and in that case the Supreme Court has held that it is only the consumption of prohibited liquor which would constitute an offence. Therefore if the prosecution is under Section 66(b), the burden would be upon the prosecution to establish that the liquor consumed is prohibited liquor and not permitted liquor. But if the prosecution is under Section 85, no question of discharging any such burden arises because, as we have already pointed out, in our opinion, a person would commit an offence even if he drinks permitted liquor, if he is drunk and incapable of taking care of himself or if he behaves in a disorderly manner or if he is intoxicated. In our opinion, it is foolish to suggest that the Legislature permitted a person what is sometime euphemistically called a medicinal preparation even though he may drink in such quantity that it may result in his becoming intoxicated. It may be

perhaps necessary to mention that Section 85(7)(2) and (3) now takes the place of Section 61AA of the District Police Act and 122A of the Bombay City Police Act. Therefore what the Legislature was aiming at was the same evil which was sought to be remedied by these provisions in the Police Acts. We must frankly confess that even this construction itself would lead to one difficulty and that is that it is difficult to understand why under Sub-section (3) holders of permits are exempted. The Advocate General suggested that if a person was given a permit, he was allowed to drink and therefore his ease was taken out of Sub-section (3) of Section 85(7); but we do not understand why if the person is given a permit to drink he should get intoxicated and go to a public place. It almost seems as if permit holders have been looked upon under this section as a favoured class. To be intoxicated in a public place or to be incapable of taking care of oneself while drunk in a public place or behaving in a disorderly manner under the influence of drink in a public place is indefensible whether the act proceeds from a person who has a permit or proceeds from a person who has no permit and who has taken a medicinal preparation. The Advocate General has also drawn our attention to the fact that under the terms of the permit it is not permissible to a licensee to drink in a public place or to drink and go to a public place in a state of intoxication, and our attention was also drawn to Section 77 which clearly penalises the holder of a permit who commits a breach of any term of the licence or contravenes any rule or regulation or order made under the Act.

11. We must now proceed to apply the principles we have laid down to the 4 cases before us.

12. With regard to the first, which is Criminal Appeal No. 130 of 1955, which is the appeal of the State against acquittal, the only evidence of being drunk is that the accused smelt of liquor. He has been convicted under Section 85(3) and as that evidence, as we have just decided, does not constitute an offence under Section 85(3), the appeal of the State must be dismissed and the order of acquittal passed by the Sessions Judge, Thana, must be maintained.

13. With regard to the second case, which is Criminal Revision Application No. 1294 of 1954 preferred by the accused, the learned Magistrate convicted the

accused under Section 85(2) and 85(2). He appealed to the Sessions Judge and the Sessions Judge confirmed the conviction under Section 85(2) and also the sentence which was imprisonment till the rising of the Court and a fine of Rs. 100. Now the evidence on which this conviction was based was that the accused was senseless, was indulging in abuses and was smelling of liquor. Therefore this is not a case of an accused merely having drunk liquor. It is a case where drinking has definitely resulted in drunkenness. On these facts therefore, in our opinion, the conviction by the Sessions Judge under Section 85(2) is justified. Mr. Seth wanted to take us through the evidence. Now the accused never challenged his conviction before the Sessions Judge. His appeal was directed merely to the sentence and it is clear that in a Criminal Revision Application, it is not open to the accused to go into a question of fact. We must accept the finding of fact given by the Courts below. Therefore the Criminal Revision Application of the accused fails and the rule will be discharged. The order of conviction and sentence is upheld.

14. The third is also an application for revision by the accused who was convicted under Section 85(1)(3) of the Prohibition Act. The only evidence in this case was that the accused was conscious, he was non-garrulous, his pupils were equal and reacting to light and his gait was slightly unsteady. In our opinion this evidence is not sufficient to constitute the offence of intoxication under Section 85(J)(3). The learned Magistrate sentenced him to imprisonment till the rising of the Court and a fine of Rs. 40 and in appeal the Sessions Judge confirmed the conviction and sentence. We will, therefore, allow the Criminal Application for Revision and set aside the order of conviction and sentence and direct that the accused should be acquitted and fine if paid should be refunded.

15. The last is the reference made by the Additional Sessions Judge, Poona. The accused was convicted under Section 66(b) and 85(7) and the reference is only made with regard to Section 66(b). In view of the recent decision of the Supreme Court, we must accept the Reference made by the learned Assistant Judge inasmuch as the burden cast upon the prosecution under that section has not been discharged. With regard to Section 85(1) there is no reference and even the judgment of the learned Assistant Sessions Judge makes it clear that there was sufficient evidence that the accused was under the influence of alcohol. Therefore

we will accept the reference and set aside the order of conviction and sentence passed by the learned Magistrate under Section 66(b) of the Bombay Prohibition Act. Fine if paid should be refunded.

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