

The State Vs. Azizkhan Subedarkhan

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Court : Mumbai

Decided On : Dec-12-1955

Reported in : AIR1956Bom680; 1956CriLJ1294

Judge : Shah and ;Vyas, JJ.

Acts : [Bombay Police Act, 1951](#) - Sections 37, 37(1), 135 and 155; [Bombay General Clauses Act, 1904](#) - Sections 23; [Evidence Act, 1872](#) - Sections 114

Appeal No. : Criminal Appeal No. 1133 of 1955

Appellant : The State

Respondent : Azizkhan Subedarkhan

Advocate for Def. : S.B. Vakil, Adv.

Advocate for Pet/Ap. : Government Pleader

Judgement :

Shah, J.

1. This is an appeal by the state of Bombay against an order of acquittal passed by the Second Extra Additional Sessions Judge, Ahmedabad, in Criminal Appeal No. 30 of 1955.

1a. The accused Azijkhan Subedarkhan was found drunk and unconscious and lying on a public road in the Khanpur area in the town of Ahmedabad. On receiving information, the Sub-Inspector of Police Khanpur went to the place where the accused was lying. The accused was searched and a Rampuri knife was found on his person. The same was attached under a panchanama. Thereafter, the accused was charge-sheeted for having committed an offence under Section 135, Bombay Police Act. The accused pleaded not guilty.

Before the trial Court, a copy of the notification dated 16-10-1953 issued by the District Magistrate, Ahmedabad, under Section 37(1), Bombay Police Act, 22 of 1951, was produced and exhibited as Ex. 1-B. The prosecution also led the evidence of Sub-Inspector Vaishnav of the Police Station at Khanpur who deposed to the condition in which the accused was found lying on a public road and the circumstances in which the knife was found on his person.

The learned trial Magistrate held that the accused was found with a Rampuri knife in contravention of the notification under Section 37(1), [Bombay Police Act, 1951](#), and the accused had, therefore, committed an offence punishable under Section 135 of the Act. The learned Magistrate accordingly convicted the accused and sentenced him to suffer rigorous imprisonment for 7 days and to pay a fine of Rs. 5/-and in default of payment of fine to suffer rigorous imprisonment for two days in addition.

Against his conviction and the sentence passed upon him, the accused preferred an appeal to the Court of Session at Ahmedabad. In appeal, the learned Second Extra Additional Sessions Judge, set aside the conviction and the sentence. In the view of the learned Sessions Judge, there was no proof on the record of the case that the notification relied upon was published in the manner required by Jaw.

The learned Sessions Judge agreed with the view of the learned trial Magistrate that the accused was found in possession of a Rampuri knife, but in his view the accused was not guilty of the offence charged against him under Section 135, Bombay Police Act because it was not established by the prosecution that there had been due publication of the notification under Section 37(1) contravention whereof was charged against the accused. The state has preferred an appeal

against the order of acquittal passed by the learned Second Extra Additional Sessions Judge.

2. Section 135, Bombay Police Act provides inter alia penalty for contravention of orders lawfully made under Section 37 and abetment of the disobedience thereof. Section 37, Bombay Police Act confers powers upon the Commissioner of Police and the District Magistrate to prohibit certain acts for prevention of disorder.

Prohibition can be Imposed under Section 37(1) for preservation of public peace or public safety by a notification publicly promulgated or addressed to individuals, and by such notifications carrying or arms, cudgets, swords, spears, bludgeons, guns, knives, sticks or lathis or any other article which is capable of being used for causing physical violence may be prohibited in any town, village or place in the vicinity of such town, village or place. In order that the power reserved to the Commissioner and the District Magistrate under Section 37 may be regarded as lawfully exercised, the notification must be publicly promulgated or addressed to individuals.

In the present case, it is evident from the terms of Ex. 1-B that the notification addressed to the public was issued by the District Magistrate and was duly published in the Government Gazette. There is, however, no evidence that the notification was publicly promulgated as required by Section 37(1), Bombay Police Act. The learned Sessions Judge, was, therefore, in our judgment, right in holding that the accused had not infringed the notification lawfully made under Section 37 of the Act.

The learned Government Pleader has contended before us that the expression 'publicly promulgated' in Section 37 means nothing more than duly published and he contends that, if the authority which has the power to issue notification, thinks having regard to the circumstances that publication in the Government Gazette is sufficient public promulgation, the Court is not entitled to review that discretion and to hold that the notification has not been publicly promulgated.

The learned Government pleader further contended that in any event the notification having been published in the Government Gazette, it must be deemed

to have come to the knowledge of all persons affected thereby and it was for the accused to establish that it was not publicly promulgated as required by Section 37(1), Bombay Police Act. In support of the latter contention, the learned Government Pleader relied upon the provisions of Section 155, Bombay Police Act and of Section 23, Bombay General Clauses Act and the presumption of fact that official acts are presumed to be properly performed.

We are unable to accept the argument advanced by the learned Government Pleader. The Legislature requires that the power reserved under Section 37 of the Act can be exercised by issuing the notification and publicly promulgating the same. The expression 'publicly promulgated' has not been defined in the Act and must, therefore, be understood in its normal connotation. Mere publication in a Government Gazette cannot, in our judgment, be regarded as equivalent to promulgation much less can it be regarded as public promulgation.

The Legislature appears to have contemplated that the authority must take steps to have the notification brought to the notice of the public who are likely to be affected thereby and that may be effected by proclaiming it e.g. by the beat or drum or affixing in public places like police stations, chavdis and other public buildings. But mere publication in the Government Gazette cannot be regarded as public promulgation within the meaning of Section 37.

Section 23, [Bombay General Clauses Act, 1904](#), provides inter alia that where in any Bombay Act it is directed that any order, notification or other matter shall be notified or published then such notification or other matter shall be notified or published then such notification or publication shall, unless the enactment or rule otherwise provides, be deemed to be duly made if it is published in the official Gazette. If the Legislature had only provided in Section 37 that the notification shall be published, publication in the official Gazette would have been regarded as sufficient compliance in view of the terms of Section 23, Bombay General Clauses Act.

In our view, the expression 'publicly promulgated' is not equivalent to publication in the Government Gazette. It is true that there is a presumption that official acts are properly performed; but before the presumption can arise, it must be established

that the official act was done and only if a dispute arises as to the propriety of the reference, the presumption may arise.

In the present case, there having been no promulgation publicly of the notification which appears to be a condition precedent of the due exercise of the power, we do not think that the presumption relied upon by the learned Government Pleader arises by publication in the Government Gazette. We are unable, therefore, to agree with the contention of the learned Government Pleader that any presumption arises of due or proper public promulgation by the District Magistrate.

3. The learned Government Pleader also referred to Section 155, Bombay Police Act in support of his contention that there had been public promulgation of the notification. That section, in so far as it is material, provides:

'Any notification issued by a Magistrate and the due publication thereof may be proved by the production of a copy thereof in the official Gazette or a copy thereof signed by such Magistrate or officer.'

In the present case, there was proper proof of the making of the notification. There was also evidence of due publication thereof. But the Legislature has not merely provided that the Notification made by the District Magistrate must be duly published. What has been provided is that it must be 'publicly promulgated'. Section 155 does not raise any presumption of public promulgation by publication in the Official Gazette.

4. We, therefore, dismiss the appeal and confirm the order of acquittal passed by the learned Second Extra Additional sessions Judge.

5. Appeal dismissed.