

Gullegar Setty Vs. the State of Mysore

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Court : Karnataka

Decided On : Sep-10-1952

Reported in : AIR1953Kant31; AIR1953Mys31; ILR1953KAR298

Judge : Vasudevamurthy, J.

Acts : Mysore Prohibition Act, 1948 - Sections 4(1) and 5; [Evidence Act, 1872](#) - Sections 106 and 114; Bombay Prohibition Act - Sections 66

Appeal No. : Criminal Revn. Petn. No. 288 of 1951-52

Appellant : Gullegar Setty

Respondent : The State of Mysore

Advocate for Def. : A.R. Somanatha Iyer, Adv. General

Advocate for Pet/Ap. : Gulur Srinivasa Rao, Adv.

Judgement :

ORDER

1. The petitioner has been convicted by the Special First Magistrate, Shimoga, for an offence under Section 4(1) (j), Mysore Prohibition Act, and sentenced to pay a fine of Rs. 100/-. On appeal, the Sessions Judge, Shimoga, confirmed the conviction and sentence. He has now come up in revision.

2. The case for the prosecution was that the petitioner was found on the Ayanoor Shimoga road to have consumed intoxicating liquor on the night of 23-4-1951 when he was travelling as a passenger in a car with his wife, and when the car was stopped by the Police Inspector of Shimoga Taluk coming to Shimoga in the opposite direction. It is not disputed that the whole of Shimoga District is a prohibition or 'dry' area and that the Prohibition Act fully applied in that area; nor is it now contended that the accused had not consumed any liquor.

But Mr. Gulur Sreenivasa Rao, learned Counsel for the petitioner, has raised a rather interesting question and that is that the case of his client does not fall under Section 4(1) (j), Prohibition Act, which refers to consuming liquor or any intoxicating drug within a 'dry' area. He urges that in a case like the present, it is not enough for the prosecution merely to establish that the accused had taken some liquor somewhere and was found smelling of liquor within the prohibited or 'dry' area, but it should also be shown positively that he had consumed that liquor within that area. He presents that it has not been proved in this case that the accused had actually consumed the liquor within such area.

In this connection he has referred to Section 5, prohibition Act. According to that section, a person is liable to punishment if he is found in a state of intoxication in any public place, or if he is found in such a state even in a private place if he does not possess a permit to drink. He urges that reading Section 5 along with Section 4(1) (j) it is only if a person is found in an intoxicated state in a dry area that he can be punished, while under Section 4(1) (j), he can only be punished if it is proved that he had actually consumed liquor within that area and that in the latter case the burden of proving where the liquor was consumed is entirely on the prosecution.

3. I am unable to accept that contention. Section 5, Prohibition Act, applies no doubt to cases where, irrespective of the place of drinking, the accused is found intoxicated either in a public place or in a private place within a 'dry' area, and Section 4(1) (j) to cases where the accused has consumed liquor within the 'dry' area. In the latter case proof of the intoxicated condition is not necessary. But where in a case like the present the prosecution has proved that the accused was found to have consumed liquor, without being intoxicated, in a 'dry' area, at a place

and under circumstances which Prohibition that he did so in a dry area it is really for the accused to plead and prove that he took the drink in a non-prohibition or 'wet' area.

The exact place where the accused actually drank the liquor is a matter specially within his knowledge. In the ordinary course of events, he may be expected to have taken it somewhere locally in the vicinity where he is found. It is open to him to show that he took the liquor in a 'wet' area and had travelled or moved into a 'dry' area while the effects of drinking were still persisting. In this connection Mr. Sreenivasa Rao has strongly relied on a case reported in -- 'State v. Pranjivan Gendalal' AIR 1952 Sau 35.

In that case the accused was found in Bhavanagar in a drunken condition. He was charged with an offence under Section 66(b), Bombay Prohibition Act, of having consumed an intoxicant without a permit. There was no evidence on record as to where the accused had actually taken the intoxicant. The learned Sessions Judge found that it had not been proved that the respondent had taken an intoxicant within the limits of the jurisdiction of the Magistrate who had tried the accused and convicted him; and he, therefore, held that the accused could not be convicted at Bhavanagar of the offence of having taken an. intoxicant within that area.

Upholding that decision, Chhatpar J. observed that there could be no presumption that in the natural course of events a person should be considered to have taken liquor at the place where he was found drunk. 'The effect of drink may last for several hours and during that interval a man may proceed from place to place'; the local limits of the jurisdiction of the Magistrate at Bhavanagar were confined to the limits of that Taluka and another adjoining area and it was quite possible that a person may reach Bhavanagar from outside such limits within a very short period of time especially in view of quick travel by plane or railway.

4. The Advocate-General, who appeared for the State in that case, had put forward two contentions. He urged that under Section 114, Evidence Act, a Court may presume that liquor could have been drunk at the place where the accused was apprehended; and obviously there could be no such general presumption of law or fact under that section as rightly observed in that case. It would be a fact to

be determined in each case, though if a man was found with the effects of drink on him in a dry area far away from a wet area where the drink could have been taken, the Court would be naturally justified in relying on it as an ordinary probability taken along with the evidence that the accused must have consumed the liquor in the dry area.

Under Section 5 no person in a dry area is allowed to keep or drink liquor without a permit and the accused would have to explain how he came by the drink. The Advocate-General had also relied upon Section 106, Evidence Act, and argued that as the fact of drinking was within the special knowledge of the accused, the burden lay upon him to prove that he drank liquor outside the limits of the jurisdiction of the Magistrate. Chhatpar J. said that Section 106 no doubt applied to criminal cases, but relying on the illustration to that section he thought that that section could only apply if the prosecution could not prove a negative fact. He held that positive facts giving jurisdiction to a Court must in all cases be established by evidence by the prosecution.

5. With great respect to that learned Judge, I am unable to fully agree with him with regard to the scope of Section 106, Evidence Act. It says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It gives two illustrations. The first illustration relates to some intention which the accused may have had and which is specially within his knowledge and which might have a bearing on his guilt or innocence. Illustration B is a case of travelling on a railway without a ticket; as the fact whether he provided himself with a ticket before he boarded the train is a matter clearly within the special knowledge of a person accused of such an offence, this illustration says that the burden of proving that he had a ticket is on him. Those illustrations cannot be exhaustive of all cases.

It is obviously impossible for the prosecution to establish the exact place where the accused could have taken his drink. If the accused pleaded and proved that he took the drink in an area where it was not an offence to do so he may no doubt be not guilty of an offence under Section 4(1) (j). The prosecution cannot prove a negative, viz., that he did not drink in a non-prohibited or 'wet' area; or that he

consumed his drink within any particular place in the prohibited area, which is a matter peculiarly within the accused's knowledge.

The case in -- 'State v. Pranjivan Gendalal, AIR 1952 Sau 35 was really concerned more with the question of jurisdiction and has reference to some special topography of the area. Though some observations in that case might lend some support to Mr. Gulur Sreenivasa Rao's argument, I do not think he can contend on their strength that his client is not guilty. The accused in this case did not plead or show that he had taken the liquor in a wet area and had subsequently come into the dry area. He totally denied he had consumed any drink at all and both the Courts have rightly held that he had done so.

6. As pointed out in -- 'Rambharose v. Emperor' AIR 1938 All 833 there is no doubt that Section 108, Evidence Act, cannot be invoked to make up for the inability of the prosecution to produce evidence of circumstances necessary to prove the guilt of the accused. But where the facts proved by the evidence give rise to a reasonable inference of guilt unless the same is rebutted, and such inference can be negated by proof of some fact which in its nature can only be within the special knowledge of the accused I do not see why Section 106 should not be applied and its effect considered while weighing the evidence. As observed in a Madras case reported in -- 'E. D. Smith v. Emperor', 19 Cri LJ 189 (Mad) at p. 194 :

'No doubt an accused is always entitled to hold his tongue; but where the only alternative theory to his guilt is a remote possibility which, if correct, he is in a position to explain, the absence of any explanation must be considered in determining whether the possibility should be disregarded or taken into account. The provisions of Sections. 106 and 114, Evidence Act, are not without bearing on the point.'

I, therefore, see no reason to interfere with the conviction of the petitioner and the same is affirmed.

7. As regards sentence Mr. Gulur Sreenivasa Rao has urged that the fine of Rs. 100/- is too much. The evidence in this case is that the accused was in a private

motor car and it is not established that he was in an intoxicated condition or was otherwise making himself objectionable. I think in the circumstances of the case the fine is rather excessive and I reduce it to Rs. 50/-. The excess of fine, if it has been collected, will be refunded to the accused. Subject to this slight modification in the sentence this revision petition is dismissed.

8. Revision dismissed.

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