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Thimmiah Vs. the State of Mysore

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Court : Karnataka

Decided On : Jan-19-1966

Reported in : AIR1967Kant83; AIR1967Mys83; (1966)1MysLJ515

Judge : M. Santosh, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 342 and 439; Mysore Prohibition Act, 1961 - Sections 13, 61(1), 66, 76(2), 86, 109 and 109(1)

Appeal No. : Criminal Revn. Petn. No. 348 of 1965

Appellant : Thimmiah

Respondent : The State of Mysore

Advocate for Def. : B.K. Ramachandra Rao, High Court Govt. Pleader

Advocate for Pet/Ap. : M. Dasappa, Adv.

Judgement :
ORDER

1. The Petitioner, who is the accused, has been convicted under Section 76(2) of the Maysore Prohibition Act and sentenced to seven days' rigorous imprisonment and also to pay a fine of Rs. 25/- in default to undergo simple imprisonment for one week. He filed an appeal against the said conviction and sentence to the learned Sessions Judge of Coorg, Mercara, which was dismissed and the said

conviction and sentence was confirmed. He has come up to this Court in revision questioning the correctness of the said Order.

2. Sri Dasappa, the learned Counsel for the Petitioner has contended that there is no sufficient evidence that the petitioner was found drunk. He argues that it is the duty of the prosecution to prove the case and the onus is always on the prosecution to prove that the accused had consumed prohibited liquor. He further contends that the defence of the accused was that ho had taken B. G. Phos and the evidence of the Doctor coupled with the statement of the accused and the medical certificate produced by him, establish the case of the accused that he had not taken any alcohol but had taken only some medicinal preparation. He also contends that the medical certificate produced by the accused in this case need not be formally proved by examining the doctor as Section 86 of the Prohibition Act permits the same. He also argues that the learned Sessions Judge has not relied on the evidence of P. W. 2 and as such this Court, should not act on his evidence.

3. He has strongly relied on the decision of the Supreme Court in Behram Khurshid v. Bombay State, : 1955 CriLJ215 in which it has been observed as follows:

'The bare circumstance that a citizen accused of an offence under Section 66 (b) is smelling of alcohol is compatible both with his innocence, as well as his guilt. It is a neutral circumstance. The smell of alcohol may be due to the fact that the accused had contravened the enforceable part of Section 13(b) of the Prohibition Act. It may well be due also to the fact that he had taken alcohol which fell under the unenforceable and inoperative part of the section. That being so, it is the duty of the prosecution to prove that the alcohol of which he was smelling was such that it came within the category of prohibited alcohols and the onus was not discharged or shifted by merely proving a smell of alcohol.'

4. Relying on this passage, the learned Counsel for the petitioner contends that the mere fact that the petitioner was smelling of alcohol does not carry the prosecution case any further. It is a neutral circumstance and it is compatible both with his innocence as well ashis guilt. So, he contends that in this particular case,

the prosecution has not made out a case against the petitioner that he was drunk.

5. It may be pointed out that in the very next paragraph of the said judgment quoted above, Their Lordships of the Supreme Court observed as follows:--

'The onus thus cast on the prosecution may be light or heavy according to the circumstances of each case. The intensity of the smell itself may be such that it may negative its being of a permissible variety. Expert evidence may prove that consumption in small doses of medicinal or other preparations permitted cannot produce the smell or a state of body or mind amounting to drunkenness.'

Their Lordships have stated that the intensity of the smell itself may be such that it may negative its being of a permissible variety. Expert evidence may prove that consumption in small doses or medicinal or other preparations permitted cannot produce the smell or a state of body or mind amounting to drunkenness. So from this it is clear that where there is expert evidence which proves that the consumption is not due to medicinal or other preparations, their Lordships pointed out, that it is permissible for the prosecution to rely upon it and in such a case the onus cast on the prosecution is duly discharged.

6. The learned Government pleader has argued that in the instant case the prosecution has proved the case against the petitioner and discharged the onus which lies on it. The case of the petitioner was that he had taken B. G. Phos and symptoms found on him were due to the fact that he had consumed that medicine. The learned Government pleader argues that the evidence of the Doctor P. W. 1 in this case definitely negatived the plea that the symptoms ' are due to his taking B. G. Phos. P. W. 1. Dr. Sangane Gowda when examined has stated that when the petitioner was produced before him he observed the following symptoms :

(1) Breath smells of alcohol;

(2) Pupils dilated and eyes are contested,

(3) Pulse 92 per minute,

(4) Incoherent speech

(5) Staggering gait.

In the opinion of the Doctor, the petitioner has taken alcohol and he was also intoxicated. He further slated that the petitioner was incapable of taking care of himself. In his cross-examination he has stated as follows:-- '..... I smelt only alcoholic smell.B. G. Phos contains 17 per cent of alcohol. If one takes in excess quantity he is not intoxicated. If the whole bottle is taken all the symptoms in a modified form exist. But he cannot have the smell of alcohol. Other symptoms will ba there. A bottle of B. G. Phos contains 4 ounces of tonic. The intoxication lasts for 12 hours.' It is clear from the evidence of the Doctor that if a person takes the whole bottle of B. G. Phos, there will be no smell of alcohol. If the whole bottle of B. G. Phos is taken all the symptoms in a modified form will exist. He further states that if one takes in excess quantity of B. G. Phos he will not be intoxicated. There is therefore force in the contention of the learned High Court Government Pleader that the evidence ofthe Doctor definitely establishes that the symptoms found on the petitioner are not clue to the fact that he had taken B. G. Phos. I am therefore of the opinion that the evidence of the Doctor definitely disproves and negatives the case of the petitioner that he had taken B. G. Pho.s and the symptoms found on him was clue to his taking excess close of B. G. Phos. It follows from this that symptoms found on the petitioner were due to his taking alcohol and not B. G. Phos. I am, therefore, of the opinion that there is no merit in the contention urged by the learned Counsel for the petitioner. The prosecution has established the case against the petitioner.

7. Sri Dasappa has relied on the decision in State of Maharashtra v. Laxman, : AIR 1962 SC1204 . His argument is that the evidence of the Doctor coupled with the statement of the petitioner made under Section 342 Cr. P. G. should have been accepted by the lower Courts. In that particular case, in a prosecution under Section 66(1) of the Bombay Prohibition Act, it was proved that the accused's breath was smelling of liquor at the time of his arrest and that on examination of his blood it was found to contain O.148 per cent ethyl alcohol. The accused in his examination under Section 342 Criminal Procedure Code, gave an explanation that he had not consumed prohibited alcohol but had taken ounces of tincture of neemm as the was used to it. The Doctor who examined the accused also

deposed that the consumption of six ounces of that substance would produce that amount of concentration of blood. The Courts below accepted the explanation of the accused and acquitted him holding that no offence was committed by him. The Supreme Court in appeal held that the explanation given by him under Section 342 Cr. P. C. coupled with the evidence of the Doctor was sufficient to acquit the accused and refused to interfere with the same.

8. This decision is of no assistance to the petitioner. In that particular case, the evidence of the Doctor lifted in with the explanation of the accused. The Doctor stated that the consumption of six ounces of Tincture of neem would produce that amount of concentration of blood, as found on the petitioner. Since both the lower courts accepted the explanation of the accused, the Supreme Court refused to interfere with the acquittal.

9. The learned Counsel for the Petitioner also contended that the Medical Certificate produced by the petitioner should have been accepted by both the lower courts and they were wrong in thinking that the Medical Certificate was not properly proved. His contention is that under Section 86 of the Mysore Prohibition Act 1961, any document purporting to be a certificate given under the hand of a Registered Medical Practitioner may be used as evidence of the facts stated in such certificate, and it is not necessary to summon or examine the Doctor to prove the said medical certificate. But, the learned High Court Government Pleader has pointed out that Section 86 of the Act does not apply to the certificate produced by the petitioner. The Petitioner's Counsel has relied on Section 86 (a) and not OH SECTION 86 (b), as admittedly Section86 (b)has no application to the certificate produced by the petitioner. Section 86 (a) states that:

'a certificate under the hand of a Registered Medical Practitioner or the Chemical Examiner or Assistant Chemical Examiner to Government under Section 109 or of an Officer appointed under Sub-section (1) of that section may be used as evidence of the facts stated in such certificate.'

So, clearly only in cases where the examination is made under Section 109 of the Act and if a Medical Practitioner issues a certificate, then it becomes evidence without examining him. Section 109 refers to the examination made by any doctor

in the course of an investigation under this Act, when the person concerned is sent by any Prohibition Officer duly empowered in this behalf by the State Government or any Police Officer, not below the rank of a Head Constable. The certificate produced by the accused is not as a result of any prohibition Officer or of any Police Officer sending him for examination under the Prohibition Act. The learned High Court Government Pleader has also pointed out that the document relied on by the accused is not a certificate, but the prescription given to him for treatment for some ailment by a private doctor. It is also interesting to note that this prescription that the petitioner should take one bottle B. G. Phos, two tea spoonfuls for a month. Even when examined under Section 342, the petitioner did not say that he took one bottle of B. G. Phos but only stated that he took 8. G. Phos medicine that day. From this it is clear that the petitioner has never contended that he has taken bottle of B. G. Phos. All that he says is that he took some B. G. Phos medicine, and if that is so, the evidence of P. W. 1 the doctor clearly proves that the symptoms he found on the petitioner could not be due to his taking B. G. Phos.

10. The last contention of the petitioner that as the evidence of P. W. 2 Police Officer has been rejected by the learned Sessions Judge this Court should not accept the same. I am not much impressed with this argument. The learned Sessions Judge has rejected the evidence of P. W. 2 because of some defect in the Mahazar. Simply because the Mahazar is not reliable it is no reason for rejecting the evidence of P. W. 2-As pointed out by the learned Government Pleader, the Mahazar is not substantive evidence. It can only be used to corroborate the evidence of a witness. The evidence of P. W. 2 the Head Constable is that he found the petitioner coming in the opposite direction with staggering gait and incoherent speech, and his mouth smelling of liquor and eyes red. So he got the accused examined by Medical Officer. The evidence of P. W. 2, that the petitioner was drunk, has been fully corroborated by the evidence of P. VV. I the Doctor. When the Doctor examined him, he found the symptoms mentioned by him which has been referred to earlier. It may also be mentioned that the trial court has accepted and believed the evidence of P. W. 2. I am therefore, of the opinion that the learned Sessions Judge was not correct in not relying on the evidence of P. W. 2.

11. I do not find any merit in any of the contentions put forward by Sri Dasappa on behalf of the petitioner.

12. In the result, the conviction and sentence passed on the petitioner are confirmed.The revision petition fifed by him is dismissed.The petitioner will surrender to his bail and willundergo the rest of the sentence impound onhim by the trial Court.

13. Revision dismissed.

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