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In Re: Y. Balaram

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Court : Andhra Pradesh

Decided On : Aug-14-1957

Reported in : 1958CriLJ125

Judge : Manohar Pershad, J.

Appellant : In Re: Y. Balaram

Advocate for Pet/Ap. : Shri. Bhima Raju

Judgement :
ORDER

Manohar Pershad, J.

1. This is a revision on behalf of the accused against the judgment of the Sub-Divisional Magistrate, Gudivada, dismissing his appeal and confirming the order of the Stationary Sub-Magistrate, Gudivada, dated 4-8-1955, holding the accused guilty under Section 4(1) (j) of the Madras Prohibition Act X of 1937 and sentencing him under Section 245, Criminal Procedure Code, to pay a fine of Rs. 50 and in default to undergo rigorous imprisonment for a period of six weeks.

2. The brief facts are that the Station Officer, Gudivada, filed a charge-sheet against the petitioner for an offence under Section 4(1) (j) of the Madras Prohibition Act X of 1937, alleging that on 13-5-1955 at about 10-30 p.m., he was found on a public high road near Gowri Shankar Cinema Hall in a state of

drunkenness. He was sent to the Government Medical Officer who issued a certificate of drunkenness. The accused denied the offence and stated that the Circle Inspector and the Sub-Inspector of Police bore grudge against him and have filed a false case against him due to the influence of Shri Anugrah, formerly Circle Inspector (now under suspension) against whom he deposed in. an enquiry before the Tribunal and also due to the fact that he sent up a petition to the District Superintendent of Police against them. The prosecution examined 2 witnesses. In defence the accused produced two witnesses. The learned Sub-Magistrate on the evidence held that the accused is guilty and sentenced him to the punishment as aforesaid. On appeal the judgment of the Sub-Magistrate was confirmed. Hence this revision.

3. Shri Bhima Raju, learned Counsel for the petitioner, argued first that the charge-sheet and the examination of the accused would reveal an offence under Section 4-A of the Madras Prohibition Act X of 1937 whereas the accused has been convicted under Section 4(1) (j) of the Act which was illegal and improper. The second contention advanced is that there is absolutely no evidence in the case to establish the guilt of the accused.

4. On behalf of the respondent it is contended that even though the charge-sheet and the examination of the accused was under Section 4-A of the Act, and the accused has been convicted under Section 4(l)(.i) that would not be improper and would not help the accused unless prejudice is shown. It is next contended that there is sufficient evidence on record to establish the guilt of the accused, and both the Courts have held the accused guilty and there Is no reason why this Court should come to a different conclusion. In so far as the first point is concerned it is no doubt true that the charge-sheet and the examination of the accused do reveal an offence under Section 4-A and the accused has been convicted under Section 4(1) (j) of the Madras Prohibition Act (X of 1937). But this in my opinion would not vitiate the trial. Further, it has not been shown how the accused has been prejudiced. Section 4(1) (j) reads whoever consumes or buys liquor or any intoxicating drug' and Section 4-A reads 'whoever is found in a state of intoxication in any public place.

5. Whether the accused is charged under Section 4-A or under Section 4(1) (j) it does not make any difference. Section 4-A is in a sense a graver offence, viz., that of being in a state of intoxication whereas Section 4(1) (j) is a lesser offence, viz., the buying of liquor or any intoxicating, drug. This contention therefore fails. The other argument relates to the question of evidence. Usually in revision I am reluctant to go into the question of evidence but as the learned Counsel insisted that there was no evidence at all I allowed him to take me through the evidence. After going through it I find sufficient force in the contention of the learned Counsel for the petitioner. The case of the prosecution is that the accused was found in a drunken state and later on found to have consumed arrack according to the certificate issued by the lady doctor, P.W. 2. Arrack admittedly is a liquor and is a prohibited drug. It has to be seen whether the prosecution has succeeded in proving that the accused consumed arrack. Only two witnesses have been examined on behalf of. the prosecution. P.W. 1 is the Sub-Inspector of Police, Gudivada, who first found the accused in a drunken state. He deposed that the breath of the accused was smelling of arrack. In cross-examination he says he does not know the difference between the smell of arrack and the smell of medicine containing alcohol. He states further that he did not write in the first entry that the accused smelt of arrack and he does not know where the accused drank or what he drank. On further cross-examination he says he did not ask the accused as to where he drank, and that he did not record any statement of the accused. The second witness examined is the lady doctor, P.W. 2, who states that the breath of the accused was smelling of arrack. In cross-examination she says it B. G. Phos is taken there is possibility for the smell to come if that tonic contains sufficient percentage of alcohol. She further states that she did not examine the stomach contents of the accused, or his blood or urine because she was convinced that the smell was of arrack.

6. It would follow from the above that it is only from the smell that it was assumed that the accused had consumed arrack. There is no other evidence. The question that arises is whether in the absence of any direct evidence such an inference could possibly be drawn from the smell. The burden is on the prosecution to prove that alcohol of which the accused was smelling is such that it came within the category of prohibited drugs. When the accused is not normal it has to be proved

that what he consumed must have been consumed without a permit. In Glaister's 'Medical Jurisprudence and Toxicology', 9th Edn,, at p. 626, we find7 the following

The breath in most cases will smell of alcohol and it should be noted whether the odour is that of fresh or stale alcohol. Generally speaking it is not possible to state with certainty the nature of the alcohol taken as judged by odour of the breath.

Snyder in his 'Homicide Investigation', at p. 272 states;

Reliance on the smell of liquor in the breath is lull of pitfalls, due to the fact that cheap wine and beer generally produce a much more offensive breath than liquor of much higher alcoholic content.

Similar question had arisen in the case of Angamuthu, In re, 1955-1 Mad LJ 473 (A). It was also a case under Section 4(1) (j) of the Madras Prohibition Act. In that case Ramaswamy, J., observed:

In regard to consumption of liquor the only practicable method in this country now open to the prosecuting agency is to find out whether a subject's breath smells of alcohol and taking into consideration that the smell of alcohol might be simulated by consumption of other articles like old sugar, the doctor should not be content with noting that the accused smells of liquor but also note whether the unmistakable characteristic odour is that of arrack or toddy or other distinctive grain alcohol. It will only be fair to the accused, if the doctor considers that his breath is smelling of alcohol, to give him an opportunity to explain whether it was due to his having taken any medicated permissible preparation containing alcohol like arishta or asava. The chemical examination of the blood and the urine of the subject and the methods of such chemical examination are described in the following standard text-books (Indian) Lyon's 'Medical Jurisprudence for India', 10th Edn., (1953), Thacker Spink and Co., Calcutta by Lt. Col. Greval, pp. 714-715 and Mody's 'Medical Jurisprudence and Toxicology', 10th Edn., (1952).

In the light of these if I were to read the statement of the doctor I find that she has herself admitted that she did not examine the stomach contents or the blood or the urine. In the absence of such a test and the fact that B. G. Phos contains alcohol

as deposed to by D.W. 2 and admitted by P.W. 2 sufficient doubt is created as to what P.W. 2 has deposed is correct and it is not safe to base conviction on mere suspicion.

7. The revision is therefore allowed. The conviction and sentence passed on the petitioner are set aside and the fine if paid should be returned to the petitioner, G.M.J. Revision allowed.

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