

**Kundan Lal Vs. the State**

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**SooperKanoon Citation :** [sooperkanoon.com/497825](http://sooperkanoon.com/497825)

**Court :** Madhya Pradesh

**Decided On :** Oct-22-1951

**Reported in :** 1953CriLJ1156

**Judge :** Dixit, J.

**Appellant :** Kundan Lal

**Respondent :** The State

**Judgement :**

ORDER

**Dixit, J.**

1. This is a reference by the learned Sessions Judge of Gwalior recommending that the sentence of fine of Rs. 100/- imposed on Kundanlal by the City Magistrate, Lashkar for an offence under Section 8, Madhya Bharat Essential Supplies (Temporary Powers) Act (Act No. III of 1948) be enhanced. On 23.4.51, the reference was admitted and on 2.8.51 a notice was issued to Kundanlal to show cause why the sentence should not be enhanced. Kundanlal has now filed objections contending that his conviction under Section 8 of Act 3 of 1948 is itself illegal and that he should be acquitted of the charge of having contravened the provisions of Section 3, Madhya Bharat Kerosene Control Order of 1949.

2. The facts are that on 29.4.1950, the Chief Inspector, Civil Supplies Department, received information that Kundanlal was selling kerosene oil and storing it without obtaining licence for the purpose under the Kerosene Control Order. On receipt of this information, the Chief Inspector sent a bogus customer Vishwamber Dayal with marked currency notes of the value of Rs. 12/- for purchasing a tin of kerosene from Kundanlal. It was alleged by the prosecution that Kundanlal sold a tin of kerosene for Rs. 11-10-0 to Vishwambhar Dayal and returned to him a change of 0/6/- annas from the amount of Rs. 12/- given by Vishwambhar Dayal to Kundanlal. Immediately after this purchase, the Chief Inspector went to the shop of Kundanlal, seized the tin sold by him to Vishwambhar Dayal and also recovered from Kundanlal the marked currency notes. The Chief Inspector Mr. Kishori Mohan also searched the shop of Kundanlal and recovered therefrom 13 other tins full of kerosene oil. Kundanlal was then tried by the City Magistrate, Lashkar on two charges (1) firstly, that he sold a tin of kerosene to Vishwambhar Dayal at a price in excess of the control rate and as such contravened the provisions of Section 6, Kerosene Control Order; (2) and that he stored for sale 13 other tins of kerosene oil. Kundanlal was acquitted of the charge of selling one tin of kerosene oil to Vishwambhar Dayal at a price in excess of the control rate. He was, however, found guilty of the other charge and sentenced to pay a fine of Rs. 100/-, The accused admitted the recovery of 13 tins of kerosene oil from his shop, but he pleaded that they belonged to one licence-dealer of the village Guthina and that that dealer had temporarily deposited the tins with him. The learned City Magistrate rejected the defence of the accused.

3. Having heard the learned Counsel for the accused and the Counsel for the State, I have come to the conclusion that the conviction and sentence imposed on Kundanlal must be set aside. It appears to me that in holdings Kundanlal guilty under Section 8 of the Essential Supplies (Temporary Powers) Act by contravening the provisions of Section 3, Kerosene Control Order, the City Magistrate and the learned Sessions Judge have assumed that under the Kerosene Control Order, it was for the accused to explain the possession of the thirteen tins of kerosene oil and the fact that these tins were stored for sale was proved by the fact that Kundanlal sold one another tin to Vishwambhar Dayal. In my opinion, both these assumptions are unwarranted. Under the Kerosene Control

Order, no restriction has been placed on the quantity of kerosene oil that may be sold, purchased or stored by any person. There is also no provision in the Control Order which lays down that a Court will presume that any kerosene oil, for which the accused person is unable to account satisfactorily, is kerosene oil in respect of which he has contravened the Control Order, In the absence of any restriction on the quantity of kerosene oil that may be possessed by any person and of any provision in the Control Order placing the burden of proof on the accused person, clearly there can be no justification for holding that after the recovery of the tins was established by evidence and also admitted by the accused, it was for him to prove that he had not stored the kerosene tins for sale. In my view, the burden of proof was initially on the prosecution and it was for the prosecution to prove circumstances suggesting the inference that the accused held the 13 tins of kerosene oil for sale, before calling upon the accused to repel the inference. There is in the present case no evidence whatsoever, to show that Kundanlal held the stock for sale. It must be remembered that the charge of storage for sale was in respect of the 13 tins of kerosene oil which the Chief Inspector found in the shop of Kundanlal, The tin of kerosene oil which was alleged to have been sold to Vishwambhar Dayal was not one of the tins included in the charge of storage for sale. It was, therefore, necessary for the prosecution to prove that Kundanlal had already sold these thirteen tins to some person or that he intended to sell them under a contract to be entered into in the future or that he was a dealer in kerosene oil and would have in the ordinary course sold these thirteen tins of kerosene oil's There is no evidence that Kundanlal had stored these thirteen tins of kerosene oil for purposes of fulfilling the terms of a contract entered into beforehand for their sale or that he had stored them for sale under a contract to be entered into in the future. Nor is there any evidence to show that Kundanlal was a dealer in kerosene oil. A dealer has been defined in Section 3 (Kha) of the Kerosene Control Order itself, as a person dealing in the purchase, sale or distribution of kerosene. In the present case, even if the evidence of Vishwambhar Dayal is accepted that Kundanlal sold a tin of kerosene oil to him, it only shows that Kundanlal conducted a solitary transaction of sales of one tin of kerosene. But it does not establish the fact that Kundanlal carried on business in kerosene oil as a dealer. A person can be said to carry on business in some commodity only when

he conducts more transactions than one by way of trade or commerce. A single transaction of sale or purchase of the commodity is not business and the person making the sale does not by a single transaction become a dealer in that commodity. It is clear from the evidence of Kishorimohan the Chief Inspector that he did not examine the books of Kundanlal to find out whether he had been carrying on business in kerosene oil. He also did not question the accused as to how he was in possession of the thirteen tins. Kishori Mohan also admitted that he was not in a position to say whether the accused was the owner of the tins or whether he had kept them with him as a bailee. There being thus no evidence to show that Kundanlal used to carry on business in kerosene oil, from the mere fact that Kundanlal sold one another tin to Vishwambhar Dayal, the inference that he had stored 13 tins of kerosene oil for sale cannot be drawn. In my opinion, as the prosecution failed to prove in this case that the storage of these thirteen tins was for sale, the learned City Magistrate was not right in concluding that the storage was for sale merely because the explanation of the accused about the possession of the tins did not appear to the Magistrate satisfactory.

4. Mr. Inamdar, learned Counsel for the accused Kundanlal, also urged that the learned City Magistrate erred in considering the evidence of Vishwambhar Dayal as the witness was not recalled by the Magistrate for cross-examination after the framing of the charge. The contention is, in my opinion, well founded. It appears from the record that after the framing of the charge, when the accused was asked whether he wished to cross-examine any of the prosecution witnesses, the accused expressed a desire to cross-examine Vishwambhar Dayal. A summons was accordingly, issued for securing the attendance of Vishwambhar Dayal. A constable Ram Singh who was entrusted with the service of the summons deposed that he was unable to trace Vishwambhar Dayal. The learned City Magistrate thought that as the witness could not be traced, the evidence which he had given before the framing of the charge could be taken into consideration. In my view, this is not a correct proposition of law. Under Section 256 of the Cr.P.C. the right of the accused to cross-examine is absolute and a witness cannot be discharged unless and until the accused declares that he does not wish to cross-examine him or if he wishes to cross-examine him until the cross-examination is concluded. In the present case, the Magistrate was altogether wrong in

discharging the witness immediately after his examination before the charge. If the learned Magistrate had not discharged the witness, it would not have been at all difficult to trace the witness and produce him in the Court for further cross-examination. When, therefore, Vishwambhar Dayal was allowed to leave, to suit his convenience or the convenience of the Court, before the charge had been framed and before the right conferred by Section 256, Cr.P. Code had been exercised by the accused, it was the duty of the Court to see that the witness was produced by the prosecution for further cross-examination.

5. In these circumstances, the Magistrate should have expunged the evidence given by Vishwambhar Dayal before the framing of the charge. The right of cross-examination under Section 256 of the Cr.P. Code is a very important right. The accused person cannot be deprived of this right, by discharging the prosecution witnesses before the framing of the charge and then by accepting the statement of the prosecution that the witnesses cannot be traced. I think it cannot be maintained that in this case the accused has not suffered any substantial injury in the course of the trial by the failure of the prosecution and also of the Court to see that Vishwambhar Dayal was present in the Court for cross-examination after the framing of the charge.

6. For the above reasons. I set aside the conviction and sentence imposed on Kundanlal. under Section 8 of the Essential Supplies (Temporary Powers) Act and discharge the notice of enhancement of sentence issued to him. The amount of fine, if already paid by Kundanlal, fee refunded to him.