

State of Rajasthan Vs. Masits

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Court : Rajasthan

Decided On : Oct-11-1974

Reported in : 1974WLN895

Judge : Kalyan Dutta Sharma, J.

Appeal No. : S.B. Criminal Appeal No. 1066 of 1971

Appellant : State of Rajasthan

Respondent : Masits

Judgement :

Kalyan Dutta Sharma, J.

1. This is an appeal filed by the State against a judgment of Special Excise Magistrate, First Class, Jaipur, dated 6th February, 1971, acquitting Masita respondent of an offence punishable under Section 54 of the Rajasthan Excise Act, 1950.

2. The prosecution case against the respondent was that on 19.10.1968 at about 8.15 a.m. he was seen near Nawab crossing, Ghat-Gate, Jaipur; carrying illicit liquor in a gunny bag on the carrier of his cycle by Head Constable Radha Gopal and two other Constables who were patrolling the area. The Head Constable asked the respondent to stop. Out the latter ran away after leaving the cycle, the

gunny-bag containing 8 bottles of illicit wine and his Chhappals. The Head Constable seized all these articles in the presence of Motbirs after taking a sample of illicit wine for chemical analysis. The articles seized were properly sealed there and then. The Head Constable thereafter made a written report to the Station House Officer, Ramganj police station, who registered a criminal case on its basis and deputed the informant to make an investigation into the case. Radha Gopal conducted the usual investigation and sent the sample to the Chemical Analyser for analysis, who later on gave a report that the sample of wine contained 12.54 percent V/V ethyl alcohol. After collecting other necessary evidence, Radha Gopal, Head Constable, submitted the papers to Madan Lal, Station House Officer, police station, Ramganj, who, eventually made a report to the learned Magistrate for taking cognizance of the offence under Section 54 of the Rajasthan Excise Act, hereinafter referred to as the Act.

3. The learned Magistrate tried the respondent and ultimately acquitted him of the charge merely on the ground that the investigation was made into the case by Head Constable Radha Gopal, who was a police officer below the rank of officer in charge of police station and who was not competent to investigate such cases under the Excise Act. Aggrieved by the order of acquittal, the State has come up to this Court in appeal.

4. I have carefully gone through the record and heard the arguments advanced by Shri Dinkar Mehta, Deputy Government Advocate and Shri Baij Nath Kalla, learned Counsel for the respondent. It has been contended on behalf of the State that the learned Magistrate was in error in thinking that the investigation by a police officer not empowered under the Act to investigate had the effect of vitiating the entire subsequent proceedings taken in the case. According to Shri Dinkar Mehta, for the State, the investigation may be illegal but the entire proceedings based on it were not bad; because the irregularity, if any, in conducting the investigation, has not caused any prejudice to the respondent. The learned Counsel appearing on behalf of the respondent, on the other hand, relied upon an authority of this court reported as *State of Rajasthan v. Rana* 1967 RLW 559 and contended on its strength that Radha Gopal, Head Constable being not clothed with the powers of an Excise Officer under Section 10 of the Act, was not empowered to investigate

into the case and to make a report to the court for taking cognizance of the offence under Section 54 of the Act against the respondent and that the learned Magistrate had no jurisdiction to take cognizance of the said offence on such a report.

5. I have given my anxious consideration to the rival contentions. There is no dispute that under Section 67 of the Act a Magistrate is empowered to take cognizance of an offence punishable under Section 54 of the Act on his own knowledge or suspicion or on a complaint or the report of an Excise Officer. In the instant case, Shri Radha Gopal, Head Constable, was not invested with the powers under Section 47 of the Act by any notification of the State Government. Under Notification No. F. 1(52) E & T/61, dated 9-9-1961, the powers under Section 67(1)(a) were given to Sub-Inspectors of police only with certain exceptions, which are not material in this case. The Notification reads as below:

In exercise of the powers conferred by Section 10 of the Rajasthan Excise Act, 1950 (Act No. 11 of 1950) and in super session of this Department Notification No. F. 19(1)SR/50, dated the 15th May, 1951, published in the Rajasthan Gazette Vol. III Pt. 1 of 1951 the State Government hereby orders that the officers of Police and Revenue Department not below the rank specified hereunder shall exercise the powers and perform the duties under the sections mentioned against them: 1. Naib Tehsildar, Revenue Section 47 and above 2. Sub-Inspector of Police Sections 44, 47 and 67(1)(a) except in respect of the retail licences granted for sale of liquor under the Act 3. All officers of Police and Revenue Section 45 except in respect of the revenue including Constables Chowkidars and Patwaris. liquor under the Act.

Hence it may safely be held that Shri Radha Gopal Head Constable was not a competent police officer to investigate this case and that the investigation made by him is not a valid one.

6. The next question that crops up for determination is whether the cognizance of the offence under Section 54 of the Act was taken by learned Magistrate of the instance of Shri Radha Gopal, who was definitely not clothed with the powers of an Excise Officer. From a bare perusal of the report submitted before the learned

Magistrate for taking cognizance of the offence after the investigation was over, it is evident that it was made by Madan Lal, Station House Officer, Ram Ganj, Jaipur City. Shri Madan Lal has testified to this fact in his deposition before the trial court. Hence it is not open for the learned Counsel appearing on behalf of the respondent to contend that the learned Magistrate had taken cognizance of the offence at the instance of Radha Gopal, who was not clothed with the office of an Excise Officer vide adverted-to above notification of the State Government. In the ruling of this court cited by the learned Counsel for the respondent, Shri Tej Raj, at whose instance the cognizance was taken by the learned Magistrate, was not appointed as an Excise Officer under Section 9 of the Act, nor was he invested with the powers of an Excise Officer by any notification of the State Government. In view of these facts the Division Bench of this Court rightly held that the respondent could not have been legally tried on the complaint of Tej Raj, B J. In the present case, Shri Madan Lal. S.H.O. police station, Ramganj was clothed with the office of an Excise Officer by the referred-to above notification issued by the State Government under Section 10 of the Act and he could make a complaint or a report to the learned Magistrate for taking cognizance of the offence with which the respondent was charged. Hence the contention of the learned Counsel for the respondent that the learned Magistrate had no jurisdiction to try this case and that the trial held by him is illegal, cannot be accepted.

7. The next question that remains to be decided is whether failure to conduct investigation into this offence by a competent police officer has vitiated the trial and has caused any prejudice to the accused-respondent. In my opinion, investigation by a Head Constable in violation of the referred to above notification was only an irregularity which was curable under Section 537 of the old Criminal Procedure Code, which corresponds to Section 460 of the new Criminal Procedure Code. The learned Counsel for the respondent could not show in what manner the respondent was prejudiced by the illegal investigation. Liquor alleged to be illicit was not recovered during the course of investigation. It was seized by Head Constable Radha Gopal on the spot when he had seen the respondent carrying it away in a gunny bag on the carrier of his cycle. Under the Act the Head Constable could seize the liquor if he suspected it to be illicit. It appears that after the seizure, Shri Radha Gopal had made a report to the Station House Officer police station,

Ramganj and that on the basis of this report the investigation commenced. Consequently, I am of the view that the trial court committed an error in Holding that the investigation conducted by an inferior officer, who was not authorised to investigate, has vitiated the trial and has prejudiced the accused respondent. In support of my above view, I may rely on an authority of the Supreme Court in H.N. Rishbud v. State of Delhi AIR 1958 SC 196, wherein their Lordships were pleased to make the following observations on this point;

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190, Criminal P.C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190, Criminal P.C. is one out of a group of sections under the heading 'Conditions requisite for initiation of proceedings.

8. The result of the above discussion is that order of acquittal passed by the learned Magistrate is clearly unsustainable in the eye of law. The learned Magistrate ought to have decided the case on the merits, which he failed to do. The appeal filed by the State, therefore, deserves to be accepted.

9. I, therefore, accept the appeal filed by the State, set aside the judgment of the learned Special Excise Magistrate First Class, Jaipur, dated 6th February. 1971, acquitting the respondent of the offence under Section 54 of the Act and remand the case to the court of the Additional Munsiff and Judicial Magistrate No. 1, Jaipur City (East) for disposal according to law. Masita respondent is in jail. He shall be released on bail, provided he furnishes a personal bond in the amount of Rs. 6000/-, with two sureties of the amount of Rs. 3000/- each to the satisfaction of the Deputy Registrar (Judicial) for his appearance in the court of the Munsiff and Judicial Magistrate First Class No. 1, Jaipur City (East), Jaipur on 7-11-1974 and on all subsequent dates of hearing and whenever called upon to do so, until the disposal of the case.