

In Re: Rajabather

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Court : Chennai

Decided On : Nov-04-1958

Reported in : AIR1959Mad450

Judge : Ramaswami, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 103; [Evidence Act, 1872](#) - Sections 5; Madras Prohibition Act, 1958 - Sections 4(1), 16 and 32

Appeal No. : Criminal Revn. Case No. 919 of 1958 and Criminal Revn. Petn. No. 830 of 1958

Appellant : In Re: Rajabather

Advocate for Pet/Ap. : V.A.F. Coelho, Adv.;Public Prosecutor

Judgement :

ORDER

Ramaswami, J.

1. This Revision is preferred against the conviction and sentence by the learned 7th Presidency Magistrate, Egmore, in C.C. No. 9522 of 1958.

The facts are:-- On the morning of 25-7-1958 at about 3-30 A.M. P.W. 1, the Sub Inspector of Police, Otteri, on information received, raided with a party including P.W. 2, the hut of the accused in Sivashanmughapuram 'A' Block, Otteri. The

accused was actually kindling the fire of an oven. A copper pot M. O. 1 containing fermented wash of about a gallon was placed over the oven. A perforated mud pot M. O. 2 was placed over M. O. 1. M. O. 3 a receiver and pot was fixed on M. O. 2, which contained three drams of I.D. arrack. P.W. 1 collected this in a bottle M. O. 4. Over M. O. 2 was M. O. 5 a condenser. The receiver pot was placed on some bricks, M. O. 6 series. P.W. 1 dismantled the arrangements. He also found three other bottles M. O. 7 series by the side of the accused. There were 9 gallons of fermented wash in them. P. W. 2 who had been taken by the Police and who witnessed the search was present during the seizure and attested the search-list Ex. P-1. The accused was arrested and on completion of the investigation the accused had been chargesheeted for an offence under Section 4(1) (b) and (g) of the Madras Prohibition Act.

2. The case for the accused was nothing more than that P.Ws. 1 and 2 were perjuring against him. He examined a defence witness who did not give any useful evidence. D.W. 1 stated that beyond seeing the accused being taken in the Police lorry that was standing outside accused's house, he did not go inside the hut or see what was being taken in the lorry. On the other hand, the evidence of D.W. 1 corroborated the prosecution version that the hut of the accused was searched in the early hours of that morning. But this need not detain us because it is for the prosecution to establish the guilt of the accused and not for the accused to establish his innocence.

3. The learned Magistrate on examining the evidence from the abovesaid point of view, held that the prosecution has affirmatively and satisfactorily proved the guilt of the accused and found him guilty as charged and sentenced him to R I. for six months and to pay a fine of Rs. 100/-. The copper pot perforated mud pot, receiver pot, the bottles and condenser exhibited were properly disposed of.

4. The learned advocate for the Revision Petitioner took three points before me viz., that the search witness was not a resident of the locality and was a witness in another prohibition case for the prosecution and that therefore there was an irregular search vitiating the trial and conviction; secondly, that there was non-compliance with the amended provision of Section 32 of Madras Act X of 1937 as

amended by Section 16 of Madras Act VIII of 1958 and this irregularity vitiated the trial and conviction; and thirdly, that by reason of the definition of 'wash' introduced in Section 16 of Madras Act VIII of 1958, amending Section 32 of the main Act, a portion of the wash seized must have been sent to the Chemical Examiner. In my opinion none of these contentions either singly or cumulatively vitiated the trial and conviction of the accused. I shall examine them one by one.

5. Point 1:--In regard to two or more respectable inhabitants of the locality having to be associated in searches, the following information can be gathered from the standard text-books on the Criminal Procedure Code: A.I.R. Commentaries on the Criminal Procedure Code, Fifth Edition, page 268: M.L.J. Commentaries on the Criminal Procedure Code. Third Edition, Revised by M.A. Krishna-swami pp. 183-184; B.B. Mitra's Criminal Procedure Code, Twelfth Edition (1953) Pp. 202-205; Section Ranganadha Aiyar's Criminal Procedure Code, 7th Edition (1934) P. 212 and Foll.: S.C. Sarkar's Criminal Procedure Code (1958) Pages 102-103.

6. Section 103 of the Criminal Procedure Code embodying the general principle of searches requires that the search should be conducted in the presence of two or more respectable inhabitants of the locality. The respectability of a witness does not connote any particular status or wealth or anything of that kind. Any person is entitled to claim respectability, provided he is not disreputable in any way.

The words 'respectable inhabitants of, the locality' must be construed in the light of the object of the section in accordance with *maxim ut res magis valeat quam pereat*--that an act may avail rather than perish. The Legislature has made this provision to ensure fair dealing and a feeling of confidence and security amongst the public in regard to a sometimes necessary invasion of a private right regarded as almost sacred under the British system, In order to give effect to this object, it is necessary that the persons selected should be absolutely unprejudiced and uninterested in the result of what they have to take part in. The selection of officers connected with the Police, or persons who are not impartial, is not contemplated by the section. Having been a prosecution witness is not sufficient to deprive one of one's title to respectability. Only respectable persons of the locality are to be selected as witnesses for the search. The words, 'of the locality' do not

mean that they should be living within a stone's throw of the house to be searched. Nor are the words restricted to mean the same quarter.

They are comprehensive and include places even within three or four miles of the place of search. But the fact that the witnesses are from a different locality will not necessarily make the search invalid or make the evidence of such witnesses inadmissible. Similarly, the mere fact that the witnesses are taken from another locality should not be looked upon as a factor militating against their respectability. The emphasis of the section is on the word 'respectable' and not on the word 'locality'.

7. The following is the relevant case-law on the subject: Emperor v. Kan Haw, 12 Cri LJ 251 (FB) (LB); Ashan v. Emperor : AIR1936 All707 ; Gopi Mahto v. Emperor, : AIR1932 Pat66 ; Ghandalal Kalidas v. Emperor, 36 Cri LJ 704: AIR 1934 Sind 159; Raghunath v. Emperor, AIR 1932 Bom 610; Abdul Hafiz Khan v. Emperor : AIR1926 All188 ; Emperor v. Darshan Singh, AIR 1941 Lah 297; Mahtway v. King Emperor, AIR 1925 Rang 205; Emperor v. Mast Ram, ; Queen Empress v. Raman, ILR 21 Mad 83; Satagopala Charlu v. Satrughna Behara, 13 Cri LI 763: Inderjit v. Emperor, AIR 1947 All 165; Daulat Ram v. Emperor, AIR 1933 Lah 809; Mahadeo Prasad v. Emperor, ; Hajari Tika Lodhi v. Emperor, ; State v. Rangrao Bala, : AIR1952 Bom327 ; Public Prosecutor v. Velayangat Devassia, : AIR1952 Mad604 ; Lal Bahadur v. The State, ; Sunder Singh v. State of U. P., (S) : 1956 CriLJ801 ; Public Prosecutor v. Venkatachalamiah, 1956 AWR 915: AIR 1957 A 286; Johnson v. The State, 1956 AWR 676: AIR 1957 A 829; State v. Raoji Kaloji, : AIR1956 Bom528 ; Koli Ganda Malu v. State, AIR 1956 Sau 25: 1956 Cri LJ 775.

8. Bearing these principles in mind, if we examine the facts of this case, we find that P. W. 2 is a respectable person though he may not be living in the immediate vicinity. This is not surprising Because this Olteri block of huts consists of people extensively engaged in illicit distillation of liquor and the police cannot be expected to be able to secure disinterested respectable witnesses there. It need not be pointed out that the fact that P. W. 2 has been a prosecution witness before is not sufficient to deprive him of his respectability.

On the other hand, we ought to congratulate ourselves that there are at least persons of civil consciousness like P. W. 2 who are prepared to cooperate with the police in this unpleasant and in the metropolitan city the dangerous task of detecting illicit distillation of liquor when the use of knife and violence is far too rampant and of which judicial notice can certainly be taken. Point 1 fails.

9. Point 2:--The amended provision of Section 32, M. P. Act runs as follows:

'Provided further that where only toddy or wash or any sonti soru is seized under this section by any officer or person, such officer or person may destroy or cause to be destroyed on the spot, the toddy, wash or sonti soru and send the pots or other receptacles in which the toddy, wash or sonti soru was kept to the Police or Prohibition Officer or Magistrate having jurisdiction to inquire into the case, with a report attested by two or more witnesses specifying the quantity of toddy, wash or sonti soru seized and destroyed, and the number of the pots and other receptacles sent.'

10. This amendment received the assent of the Governor on 17-4-1958 and was first published in the Fort St. George Gazette on 30-4-1958. The offence in question took place on 23-7-1958. Therefore, the Police Officer should have complied with this specific provision viz., must have sent a report attested by two or more witnesses specifying the quantity of wash etc., seized and destroyed and the number of pots and other receptacles sent. In this case the pots and the receptacles have been sent to the Magistrate and the Mahazar proved by the Mahazar witness P. W. 2 has also been forwarded. There was no reason to think therefore that there has been non-compliance with the substance of this provision. This may account for the fact that this point was not raised before the lower Court.

11. Besides, even assuming that this report in terms of the amended Section 32 was not sent, that would not by itself vitiate the conviction of the accused. Their Lordships of the Supreme Court have now considered the scope and effect of irregularities in procedure in Willie (William) Slaney v. State of M. P. : 1956 CriLJ291). Their Lordships after noticing the trend of decisions of the Privy Council and of latter day criminal jurisprudence in England as well as India evidenced by the well known cases of N.A. Subramania Iyer v. King Emperor, 28 Ind App 257;

Abdul Rahman v. King Emperor ; Pulikuri Kotayya v. Emperor, 74 Ind App 65: AIR 1947 PC 67; Atta Mohammad v. Emperor , have pointed out the swing of pendulum has been away from technicality, and a greater endeavour has been made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered viz., fair to the accused, fair to the State and fair to the vast mass of the people for whose protection penal laws are made and administered, and concluded:

'The real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to substantial denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural justice'.'

The evidence in this case clearly shows that the accused had been caught red-handed with the material objects fully corroborating the evidence of P. Ws. 1 and 2 and which the learned Magistrate has accepted as truthful. Therefore, even assuming that there was non-compliance with the express provisions of Section 32 as amended by Section 16 of Madras Act VIII of 1958, this will not vitiate the trial and conviction, when the other evidence in the case had brought home the offence to the accused beyond reasonable doubt. Point 2 also fails.

12. Point 3:-- The learned advocate has really misunderstood the scope of the explanation given in Section 16 of Madras Act VIII of 1958, amending Section 32 of the original Act. It is well known that intoxicating liquors are of several kinds. We have fermented liquors which contain alcohol produced by the process of alcoholic fermentation, such as wines, ale, and beer. We have vinous liquor made from the fermented juice of grape, and which may include wine made from the fruits or berries by a like process of fermentation, when sugar and alcohol are added.

We have then malt liquor viz., an alcoholic beverage produced by the fermentation of malt. It is the product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus converged into saccharine matter, which is kiln dried and then mixed with hops and by a further process of brewing made into a beverage.

It is not necessary for our purpose to catalogue all the types of liquors and each of which requires its own method of fermentation and condensation. Therefore wash or the catalysis will be of different descriptions limited only by human ingenuity. It was doubtful whether a mixture of water and saccharine materials which will be soft to drink normally, could be considered wash for fermentation, because persons would want to escape on that ground, though such mixture of water and saccharine when in the process of vinous or alcoholic fermentation or in which such fermentation has ceased would constitute wash for illicit distillation. Therefore, when the Madras Act VIII of 1958 was enacted to plug as many loopholes as possible in the working of the Prohibition Act, the framers of the Act included this mixture of water and saccharine material as coming within the term 'wash', provided the stage at which it was, was when it was in the process of vinous or alcoholic fermentation or in which such fermentation has ceased. On that conclusion, it follows that there is no necessity to send the sample of every kind of wash seized to the Chemical Examiner in order to find out whether it was only a mixture of water and saccharine materials etc., which according to the learned advocate Mr. Coelho constitutes the sole type of wash under the Madras Prohibition Act and which contention, as I have just now pointed out, is wholly unfounded. Besides one moment's reflection will show how the working of the entire Madras Prohibition Act can be brought to a standstill in every case of seizure of wash it has got to be sent to the Chemical Examiner.

The statistics published by the Madras Government show that several thousands of prohibition cases are launched and if several thousands of portions of wash are sent to the single Chemical Examiner, with a limited staff and who is unable even to cope with murder cases, numbering a few hundreds in this State, the office of the Chemical Examiner must be multiplied more than hundred-fold. That is why no provision is made for sending the wash to the Chemical Examiner.

This contention of the learned advocate has to be rejected out of hand as wholly impracticable and made with a view to bring the working of the Madras Prohibition Act to a standstill and thereby defeat this most beneficent measure enacted in the interests of the people under the aegis of the Father of the Nation. The Prohibition Officers can legitimately be considered as experts and their evidence regarding

wash may be accepted as expert testimony and it is only when they feel baffled the aid of the Chemical Examiner need be resorted to.

13. The conviction is therefore correct. In regard to the sentence, in the circumstances of the case the ends of justice would be met if I halve the sentence of imprisonment and retain half the fine. Ordered accordingly.

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