

In Re: Oli

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Court : Chennai

Decided On : Dec-05-1975

Reported in : 1976CriLJ1339

Judge : Ratnavel Pandian, J.

Appellant : In Re: Oli

Judgement :

ORDER

Ratnavel Pandian, J.

1. The petitioner, who was accused No. 4 before the trial court, is canvassing the judgment passed by the learned Chief Judicial Magistrate of Madurai in C. A. No, 88 of 1974, confirming the conviction and sentence passed in C. C. No. 1125 of 1974 by the learned Judicial II Class Magistrate, Uthampala-yam, viz., convicting the petitioner under Section 61 (f) of the Tamil Nadu Excise Act and sentencing him to suffer simple imprisonment for three months. Before the trial court, there were four accused including this petitioner, who were tried for an offence under the above charge, on the allegation that on 20-4-1974, at about 6-45 a.m., at Cumbur-Mettu Road on the southern bank of Kalivu Odai, they were each found to be in possession of 25 litres of fermented wash fit for distillation of illicit arrack, without a valid licence or permit. The prosecution examined two witnesses on its side, of whom P.W. 1 is a Head Constable and P.W. 2 is the Sub-Inspector, Excise Wing.

As per their evidence, while they were on excise raid, they found the petitioner and the other accused in possession of four mud pots marked as M. O. 1 series, each containing about 25 litres of fermented wash fit for distillation of I. D. arrack and the wash was found to consist of Velampatti palm-gur and plantain fruit skins. Hence, all of them were apprehended. After taking sample of wash in four separate bottles (M. O. 2 series) the remaining wash in M. O. 1 series was destroyed. Ex. P-1 is the attakshi for the recovery of the contraband. Then, at Cumbur Police Station, a special report Ex. P-2 was given by the Excise Wing. After investigation, the petitioner and the other accused were charge-sheeted. The prosecution besides examining two witnesses, has also marked Exs. P-1 and P-2. The accused examined D.Ws. 1 to 3 on their side, to speak that accused 1 and 2 were taken from their houses and accused 4 from his mutton stall. The trial court found each one of them guilty of the offence with which they stood charged and convicted and sentenced them as mentioned above, and the learned Chief Judicial Magistrate has confirmed the same, observing that 'the components that are normally required for distillation of arrack were in the fermented wash' and that 'therefore there is no need for having it chemically analysed.

2. Mr. Sekkizhar, appearing on behalf of the petitioner (accused 4) who alone has preferred this revision petition, raised the only plea that in oases of this sort, the evidence based on chemical analysis is essential in order to establish that the article alleged to have been recovered from the petitioner was really wash fit for distillation and the court should not be content with anything less than a chemical report. To substantiate his contention, he placed reliance on the judgment of the Supreme Court in State of Andhra Pradesh v. Madiga Boosenna : 1967 CriLJ1398 , wherein it has been held that better proof by technical person who has considered the matter from a scientific point of view is not only desirable, but even necessary.

3. It is true that in cases of this nature, the prosecution has got a primary duty to establish by letting insufficient and acceptable evidence, viz., of an expert within the meaning of Section 45 of the Evidence Act, that the article seized is & contraband prohibited by the enactment. The next question is, who is an expert. An expert is one who has acquired special knowledge, skill or experience in any

science, art, trade or profession. Such knowledge may have been acquired by practice, observation, research or careful study. But, it is the duty of the Judge to decide whether the skill of any person in the matter on which evidence of the Expert's opinion is offered, is sufficient to entitle him to be considered an expert. In other words, it is the duty of the Judge to decide the question of competency of the witness. An expert, in order to be competent as a witness, need not have acquired his knowledge professionally; it is sufficient, so far as the admissibility of the evidence goes, if he has made a special study of the subject or acquired special experience therein.

4. In *Gobardhan v. State* : AIR1959 All53 and *Ram-karan Singh v. The Emperor* AIR 1935 Nag 13 : 1935 86 Cri LJ 511, it was held that an Excise Inspector can give expert opinion on illicit liquor but the court should under Section 51 of the Evidence Act ascertain the grounds on which his opinion is based so as to test it. In a recent decision of the Supreme Court in *Sri Chand Batra v. State of Uttar Pradesh* : 1974 CriLJ590 , their Lordships of the Supreme Court, after referring to the principles laid down in *Boosenna's case* : 1967 CriLJ1398 have observed as follows:

We think that it is not desirable to lay down an inflexible rule on questions of fact, even though their determination requires the adoption of scientific methods and tests. It is really for the Court of fact to decide whether, upon a consideration of the totality of the facts in a case, it has been satisfactorily established that the objects recovered from the possession of the accused included liquor of prohibited strength.... Another question before us is whether the Excise Inspector, whose evidence was under consideration, had sufficient knowledge to be deemed to be an expert within the meaning of Section 45 of the Evidence Act, so that the tests adopted by him, together with all the attendant circumstances, could establish beyond doubt that the appellant was in possession of illicit liquor. We think that these are also essentially questions of fact. If there is sufficient evidence led by the prosecution to establish its case, it becomes the duty of the defence to rebut that evidence.... We find that the Excise Inspector who had deposed at the very outset of his evidence, that he had put in 21 years of service as Excise Inspector and had tested lakhs of samples of liquor and illicit liquor (sic). As already pointed out, the

competence of C. D. Misra to test the composition and strength of the liquor under consideration was not questioned at all. We, therefore think that this particular Excise inspector could be treated as an expert within the meaning of Section 45 of the Evidence Act. The Excise inspector had, in addition to employing the smelling test, used all the other tests he could reasonably adopt. If his competence to give his opinion on the sufficiency of the tests adopted by him had been questioned in the trial court, the prosecution would have been in a position to lead more evidence on these questions.

Bearing in mind the observations made by their Lordships in the above case, I hold that if the court is satisfied that the Excise or Police Inspector, as the case may be, had sufficient knowledge and special experience in testing and identifying the liquor, wash etc., in question, he could be deemed to be an expert within the meaning of Section 45 of the Evidence Act, so that the tests adopted by him together with all the surrounding circumstances, could establish beyond doubt that what was possessed by an accused is a prohibited article.

5. The learned Public Prosecutor would urge that in this case, P.Ws. 1 and 2 had given evidence that the article seized was fermented wash fit for distillation, containing Velampattai, palmgur and plantain fruit skins, which would otherwise mean a mixture of water and saccharine materials fit for distillation and that since the petitioner accused has not challenged or contradicted the evidence of P.Ws. 1 and 2 on this score, it is not open to the petitioner now to contend that the prosecution has not established the fact that what are seized from the petitioner was fermented wash prohibited under the Tamil Nadu Excise Act. The word 'wash' is denned under the Explanation to Section 32 of the Madras Prohibition Act, 1937, thus-

'wash' means a mixture of water and saccharine materials, which is in the process of vinous or alcoholic fermentation or in which such fermentation has ceased.

It is found from the evidence of these witnesses that the accused has not challenged or contradicted their evidence that the materials seized from the petitioner was fermented wash. The learned Public Prosecutor, in support of his contention, placed reliance on the decision in *Queen Empress v. Gangayya* I.L.R.

(1901) Mad 417, wherein a Division Bench of this Court held that a liquid mixture known as 'wash' consisting of jaggery and foabool bark and proved to be fit for distillation, constitutes 'materials' for the purpose of manufacturing liquor within the meaning of Section 55 (g) of the Abkari Act, and set aside the acquittal of the accused and convicted him on the ground that the evidence of the Abkari Officers on this point was clear and was not contradicted.

6. Yet another decision relied on by the learned Public Prosecutor, was *Raja Bathar v. State* 1959 MWN 125 : 1959 Cri LJ 1189. In this decision Ramaswami J. after elaborately discussing Section 32 of the Madras Prohibition Act, held as follows-

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.

Finally, he brings to my notice the observations of the Supreme Court in *Sri-chand Batra v. State of U.P.* : 1974 CriLJ590 , wherein their Lordships held that the Excise Inspector can be deemed to be an expert within the meaning of Section 45 of the Evidence Act, if the test of competency and sufficiency of the opinion of the said expert is fully satisfied, and that therefore where the accused, who could be presumed to have enough knowledge about the composition and strength of the prohibited liquor, did not raise the question of its strength in the trial court, he could not be allowed to raise it in the superior court and that it is really for the court of fact to decide whether, upon a consideration of the totality of the facts in a case, it has been satisfactorily established that the objects recovered from the possession of the accused included liquor of prohibited strength, the reason being, in the words of their Lordships 'if this competence to give his opinion or the sufficiency of the tests adopted by him (Excise Inspector) had been questioned in the trial court, the prosecution would have been in a position to lead more evidence on these questions.

7. It is clear from the above decisions that if an accused does not challenge the competence of the excise or police officials, as the case may be, to give his opinion, or the sufficiency of the tests adopted by him, at the trial stage itself, he

should not be allowed to raise such contentions in the appellate or revisional courts, as that would amount to depriving the prosecution of the opportunity of leading more evidence by chemical examinations etc. on this aspect.

8. In the present case, as the evidence of P.Ws. 1 and 2 stands unchallenged and unrebutted, I agree with the contention of the learned Public Prosecutor and hold that the prosecution has made out a case against the petitioner for an offence under Section 61 (f) of the Tamil Nadu Excise Act and accordingly confirm the conviction against him.

9. Coming to the question of sentence, Mr. Sekkizhar submits that the petitioner is a first offender and that he is the only bread-winner of his poor family and therefore the court may be pleased to invoke the provisions of the Probation of Offenders Act. Having regard to the facts and circumstances of the case and the submissions on his behalf, I set aside the sentence of imprisonment imposed on him, and instead direct that he be released under Section 4 (1) of the Probation of Offenders Act, on his entering into a bond in a sum of Rs. 500, with one surety for a like sum, to the satisfaction of the Judicial Second Class Magistrate, Othamapalayam, to appear and receive sentence when called upon during a period of one year and in the meantime to keep the peace and be of good behaviour. With the above modification in the sentence the revision petition is dismissed.