

**In Re: Pandian and anr.**

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**Court :** Chennai

**Decided On :** Feb-20-1970

**Reported in :** (1970)2MLJ26

**Appellant :** In Re: Pandian and anr.

**Judgement :**

**K.N. Mudaliyar, J.**

1. The two appellants appeal against their conviction for offences under Section 10 (a) read with Rule 7 (d) of G.O.Ms. No. 3031, Home, dated 1st November, 1958, framed under Section 16 (1) of the Madras Prohibition Act, for alleged possession, without requisite medical prescription, of 1150 bottles of some Ayurvedic preparations containing an admixture of chloral hydrate, an intoxicating drug. Accused 1 is owner of the shop. Accused 2 is his servant.

2. The shop of Accused 1, situated at No. 26, Mambalam High Road in T. Nagar, was searched between 7 : 30 p.m. and 8 p.m., on 10th February, 1968 in the presence of P. W. 2 and one Veerappan (not examined). Both Accused 1 and 2 were present. In the course of such search, P.W. 1 found 950 bottles (M.O. 1 series), each bearing a label marked ' Usrabala Kashayam--Product of Jothi Pharmacy, H. O. Five Falls Road, Courtallam.' Besides M.O. 1 series, there were also 200 bottles (M.O. 2 series), each bearing a label marked ' Amirthathi Kashayam, Jothi Pharmacy, Five Falls Road, Courtallam.' The Company seals on

all the bottles in M.Os. 1 and 2 series were found to be intact P.W. 1's suspicion about the intoxicating nature of the coloured contents of M.Os. 1 and 2 series, was roused. He seized all the bottles under a search-list (Exhibit P-1) attested by P.W. 2. Five bottles from M.O. 1 series and another five bottles from M.O. 2 series, were picked out at random by P.W. 1. They were sealed in the presence of witnesses and the accused, for being sent to the Chemical Examiner, Madras for purposes of chemical analysis. A copy of Exhibit P-1 was duly served on Accused 1 who refused to affix his signature in token of service. Both the accused were arrested and taken to the police station. Exhibit P-2 is the first information report in Crime No. 436 of 1968. The ten sample bottles were sent on 13th February, 1968 to the Chemical Examiner, Madras with a covering letter Exhibit P-3 for purposes of analysis. The report of the Chemical Examiner, Exhibit P-4, which was received on 14th June, 1968, disclosed that the five bottles labelled 'Amirthathi Kashayam' (M.O. 2 series) contained self generated alcohol, glycerine, sugar, aromatic substance and chloral hydrate. The contents of the bottles were certified to be ayurvedic preparations containing an admixture of chloral hydrate, the percentage of this ingredient being 0.7 and 0.8. The five bottles in M.O. 1 series labelled 'Usarabala Kashayam' were found on analysis, to contain chloral hydrate (1.0 per cent. and 1.25 per cent.) and traces of aromatic substance. The contents were found to be free from alcohol. On the basis of the findings contained in Exhibit P-4, the charge was laid against both the accused under Section 10 (a) read with Rule 7 (d) of G.O.Ms. 3031 (Home) dated 1st November, 1958, as the possession of M.O. 1 and M.O. 2 series was not covered by any permit or medical prescription. At this stage, I am bound state that Exhibit P-4 was tendered in evidence by P.W. 1.

3. The recovery of M.O. 1 and M.O. 2 series from the shop of Accused 1 has not been controverted.

4. Accused 1 examined himself as D.W. 1. He speaks of the fact that M.O. 1 and M.O. 2 series had been received by him from the Jothi Pharmacy in Courtallam, who were the manufacturers of the medicines. The cash bill dated 25th January, 1968, marked as Exhibit D-1 as well as the transport permit marked as Exhibit D-2 relating to the goods covered by Exhibit D-1, have also been produced. According

to accused 1, he did not know that M.O. 1 and M.O. 2 series contained chloral hydrate or any other intoxicating drug. Accused 2 has not adduced any evidence in defence.

5. Rule 7 (d) of the said Government Order reads as under:

No person or member of the public shall possess any of the restricted medical preparations except on a medical prescription, or in excess of the quantity entered in such prescription.

In the Annexure containing a list of restricted preparations, under the head 'Medical Preparations ' (No. 1), item (iii) is Ayurvedic and other preparations belonging to the Indian System of Medicine. Clause (a) relates to preparations containing self-generated alcohol viz., (1) Draksharishta and (2) Drakshasava. We are actually concerned with Clause (b) relates to ' all preparations to which alcohol is added or is produced by distillation in the process of manufacture and all preparations containing intoxicating drugs.'

6. The Assistant Chemical Examiner gives the opinion that both the sample bottles picked out from M.O. 1 and M.O. 2 series, contain chloral hydrate which is; intoxicating drug under the Madras Chloral Hyderate (Chloral) Rules.

7. Mr. Coelho argued that inasmuch as the Assistant Chemical Examiner was not examined by the prosecution to prove the contents of Exhibit P-4, the prosecution must fail. He bases his argument on my observations found in the judgment in Cr.R.C. No. 407 of 1968. viz., In re Srinivasan and Anr. (1969) L.W. 208. My observations are as below:

The Appellate Court has erred in acting on this document without giving' opportunity to the accused to cross-examine the concerned witness on the relevant report. The appellate Court proceeded on the footing that M.Os. 1 to 7 contained brandy, a prohibited liquor. This has got to be proved by the author of the analysis report by giving evidence and marking the said document.

I am afraid the learned Counsel has based his argument on an extract from my judgment torn out of context. In the peculiar circumstances of that case, it is

apparently clear that before the trial Magistrate, the report of analysis made by the Assistant Director and Assistant Chemical Examiner to Government for Excise and Prohibition was neither tendered nor proved through any witnesses nor was it tendered legally before the appellate Judge for reception as material evidence on which the conviction was confirmed by the appellate Judge. No opportunity was given to the accused to cross examine any witness on the contents of the report of the Assistant Chemical Examiner. The learned Public Prosecutor, with a sense of fairness, brought to my notice the following significant paragraph from Sohoni's Code of Criminal Procedure, 15th Edition Volume 3, at page 2857. The excerpt of the paragraph is as follows:

The report must be formally tendered.--The report is a piece of evidence that does not require any formal proof. But, at the same time it must be tendered as evidence adduced as such. Without tendering it in evidence, it cannot be made use of for the first time in appeal.

8. Section 510 of the Criminal Procedure Code reads as follows:

(1) Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, or the Chief Inspector of Explosives or the Director of Finger Print Bureau or an Officer of the Mint, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the subject-matter of his report.

It is very clear that the report of the Chemical Examiner may be used as evidence in any inquiry or trial or other proceeding under this Code. Sub-section (2) of Section 510 gives the freedom either to the prosecution or to the accused to examine the Assistant Chemical Examiner as to the subject-matter of his report.

9. My observations in Crl. R.C. No. 407 of 1968 extracted above, were never intended to mean that in every case where the report of the Assistant Chemical Examiner has to be received or used as evidence in any inquiry, trial or other proceeding under this Code, the Assistant Chemical Examiner who happens to be the author of the report must necessarily be examined to prove the subject-matter of his report. Only in exceptional cases it may be necessary that the Assistant Chemical Examiner may be examined either by the prosecution or by the accused. All that the law requires is that the report of the Assistant Chemical Examiner has got to be tendered in evidence in the course of the inquiry or trial or other proceeding under the Code. My observations are neither of universal application, nor of the widest amplitude as is sought to be made out by the learned Counsel for the appellants. Those observations were made in the very peculiar circumstances of the case in a very restricted and narrow sense.

10. After having found that M.O. 1 and M.O. 2 series do contain an intoxicated drug, in view of the terms of Exhibit P-4 and Section 510, Criminal Procedure Code, the question that falls to be determined is whether the accused knew about the contents of M.O. 1 and M.O. 2 series. It is true, in one sense he was undoubtedly in possession of M.O. 1 and M.O. 2 series, which contain an intoxicated drug. But, it has been argued by the learned Counsel for the appellants that Accused I was only a retailer who has purchased them from the Courtallam manufacturer and he really did not know the contents of these bottles. The learned Public Prosecutor fairly conceded that on the basis of the reasoning found in the judgment of Panchapakesa Ayyar, J., in *Abdulla v. State* (1951) M.W.N. 109, it is not the duty of the appellants to examine the contents of these bottles purchased by them for sale from the manufacturer. It is no doubt the responsibility of the manufacturer at the Courtallam and not to mix up an intoxicating drug in M.O. 1 and M.O. 2 series falling within the ambit of the list of restricted preparations. Apparently it appears that these preparations have been exempted under Appendix 3-A. The learned Judge observes in *Abdullah v. State* (1951) M.W.N. 109, as follows:

No dealer can be compelled under the law to open bottles of medicines and preparations containing a percentage of spirit and exempted from the Act, in order

to see whether they contained more spirits than found by the authorities when they were exempted..Once the Government takes the grave responsibility of exempting any medicine or preparation from the Prohibition Act, it must take the risk of some of the bottles of that preparation so exempted containing, either deliberately or accidentally more spirits than the bottles submitted to the Government for purposes of exemption did. That risk will be greater in the case of country preparations.....Once the preparation is exempted, it must be taken for granted that any dealer or commission agent, like this petitioner, trading in such preparations is free to trade in it without examination of the contents or limitation of the period of keeping unless, of course, the notification exempting the preparation prescribes these additional limitations, which is not the case here, or the dealer adds spirits himself, which also is not the case here.

11. On this reasoning, I consider that the argument made by the learned Counsel for the appellants is well-grounded, and the learned Public Prosecutor's concession that he cannot support this conviction in the light of the reasoning in this judgment is also quite consistent with the traditions of fair advocacy which always exist in this Court.

12. In the result, I acquit them. The appeal is allowed.