In Re: Muthukrishnan

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Court : Chennai

Decided On : Oct-12-1961

Reported in : (1962)2MLJ95

Appellant : In Re: Muthukrishnan

Judgement :
ORDER

Veeraswami, J.

1. The petitioner was convicted by the Sub-Magistrate of Villupuram of an offence under Section 4(1) (a) of the Madras Prohibition Act for transporting liquor bottles, of which eight were half bottles of Highland whisky, four half bottles of Koday's old whisky and four half bottles of Sovereign pure brandy, from Pondicherry to Villupuram. The case for the prosecution was that at 10-20 p.m. on 13th July, 1961, the Sub-Inspector belonging to the Villupuram Railway Police was watching for prohibition offences at the Villupuram Railway Station platform. At the time, he stopped the petitioner and on suspicion searched him with the result that he was found to have a bag containing the bottles of whisky and brandy. Along with the bottles was seized also a third-class Railway ticket from Pondicherry to Villupuram. According to the prosecution, a mahazar was prepared attested by two witnesses for the seizure of the bottles of whisky and brandy, as also the Railway ticket. The only evidence on which the prosecution sought to prove the case, was that of the Sub-Inspector of Police. Both the Courts below accepted his evidence

and convicted the petitioner as aforesaid.

2. On behalf of the petitioner, three points have been raised in this Court. One is that the prosecution has failed to establish beyond doubt in this case that the contents of the bottles were whisky and brandy. It appears from the cross-examination of the Sub-Inspector of Police that the petitioner challenged the nature of the contents of the bottles. The Sub-Magistrate, notwithstanding the challenge by the petitioner, did not have the contents of the bottles analysed in order to satisfy himself that they were whisky and brandy. Instead, what the Sub-Magistrate did was himself to open the bottles, examine the contents and satisfy himself that they were bottles of whisky and brandy. This is how the Sub-Magistrate dealt with the point:

Learned Counsel for defence cast a doubt on the contents of M.O. 2 to 4 series bottles as to whether they are liquor at all. The bottles were fresh ones with the company seal intact and label on them showed that they contained whisky and brandy. In view of the doubt raised by the learned Counsel for the defence, these bottles were all opened in open Court and their contents were examined by me, and I am quite convinced that the contents of these bottles are whisky and brandy as their labels indicate and there is no doubt whatever about this and no expert opinion or chemical test is necessary to show this, which is so very patent from the appearance of strong smell of the contents.

In a later part of the judgment the Magistrate states that the brandy and whisky have been destroyed after examining them in Court, and that only empty bottles were confiscated to the State. It will be seen, therefore, that the Sub-Magistrate purported to draw a presumption as to the contents of the bottles being whisky and brandy not only from the seals in the bottles being intact and the labels on them, indicating that the bottles contained whisky and brandy, but also from his own visual examination of the contents and the smell they emitted.

3. In cases like this, it is no doubt permissible to draw an inference, under Section 114 of the Evidence Act from certain external features and circumstances, like the label and smell indicating the nature of the contents of the bottles, the cork being intact and so forth, that the contents are prohibited liquor. But when a challenge is

made by an accused that the contents are not prohibited liquor and that no presumption should be drawn from the external features, it may then be necessary, in order to obviate all doubts at all stages of the case, to have the contents analysed and to put the nature of the contents beyond any possibility of speculation. In particular cases for good reasons, the Court may be satisfied that such an analysis need not be called for. But the reasons should be such as would justify that, in the particular circumstances, the presumption could be safely drawn about the contents being prohibited liquor.

4. Unfortunately in this case, the Sub-Magistrate took upon himself to open the bottles in open Court, smell the contents and satisfy himself that the contents were brandy and whisky. What is even more curious, is that after doing so, he thought fit to have the contents of all the bottles destroyed. The result is that it is now beyond the means of the prosecution to establish that the contents of the bottles were really whisky and brandy. How whisky or brandy smells and whether a ' strong smell ' , which the Magistrate sensed is in itself indicative of the contents being prohibited liquor and was sufficient to distinguish whisky from brandy, there is no means of knowing from the judgment of the trial Magistrate. The judgment of his would rather indicate that he was more led by the external aspects of the bottles. He could well have stopped with his external observations of the bottles and drawn a presumption under Section 114 of the Indian Evidence Act that the contents of the bottles were brandy or whisky. If he had done so, perhaps he would have been justified. When once he accepted the challenge of the accused, proceeded to examine the contents himself and destroy them, I should say that in doing so he acted not only indiscreetly but took upon himself the role of a prosecution witness which the Court should not do. The learned Magistrate should have borne in mind that it was for the prosecution to establish the case by evidence that the contents of the bottles were whisky and brandy and that for that purpose it was necessary to preserve them until the prescribed time. The learned Counsel appearing for the petitioner points out that the fact that the contents of the bottles had been destroyed even before his client filed an appeal rendered his position very difficult in satisfying this Court that the contents of the bottles were not whisky and brandy. I think that this argument is certainly legitimate and proper. It is to meet such a situation Rule 375 of the Criminal Rules of Practice directs that the material

objects exhibited at the trial of a criminal case should be retained by the Court until it is satisfied that the appeal time has expired and that no appeal has been presented or any appeal presented has been disposed of. The rule unmistakably points out that it is only after that the material objects may be destroyed or otherwise disposed of according to the rules. The Sub-Magistrate clearly acted in contravention of this rule in having the contents of the bottles destroyed, even before he delivered his judgment. The result is the petitioner in this Court can well say that he has been prejudiced beyond repair, for it is no longer possible to verify on his challenge whether the contents of the bottles were whisky and brandy.

5. The second point urged on behalf of the petitioner is that although the mahazar is said to have been prepared, attested by two witnesses, no reason whatever has been given by the prosecution at the trial or at the appeal stage why none of those witnesses has been examined. The Court is only left with the evidence of the Police Officer who stated that he seized the bottles at the Railway station. In such cases, where a mahazar has been prepared and attested by witnesses, it is desirable, and in some cases it may even be necessary from the standpoint of the prosecution, to examine at least one such witness in addition to the Police Officer who actually seized the materials. This is not because that the evidence of the Police Officer concerned is approached with any reservation but it will be but fair from the standpoint of the accused that the prosecution places before the Court the best evidence in respect of the seizure. In the absence of any explanation as to why at least one of the attesting witnesses has not been examined, there is room for doubt whether the evidence of the Sub-Inspector can safely be acted upon. This does not mean that the Police Officer was necessarily giving false evidence but his evidence could have been made to rest beyond criticism by examininig at least one of the attesting witnesses to the mahazar for seizure of the bottles. In the circumstances, therefore, the second point raised on behalf of the petitioner is not entirely without force.

6. The last point that is attempted for the petitioner is that in any case he could, if at all, be convicted only for being in possession of bottles containing prohibited liquor and not for transport. But this argument is on the face of it untenable because the petitioner was found in possession of a Railway ticket entitling him to

travel from Pondicherry to Villupuram. Having regard to this fact, it is clear that the offence, if any made out, was for transport of bottles containing prohibited liquor.

7. As I said, the petitioner succeeds on the first point, namely, that the prosecution has not proved beyond doubt in this case, that the bottles contained whisky and brandy and that by an indiscreet act on the part of the Sub-Magistrate, the means of the prosecution to establish the nature of the contents have been removed even before the trial Magistrate delivered his judgment. The petition is allowed. The. conviction and sentence against the petitioner are set aside and he is acquitted.

8. Before leaving this judgment, I think the conduct of the Sub-Magistrate in destroying the contents of the bottles even before he delivers his judgment cannot be left at that, inexplicable and most surprising as it appears to be, besides its being in flagrant contravention of Rule 375 of the Criminal Rules of Practice. The Sub-Magistrate will be separately called upon to explain his conduct. A copy of this judgment will be forwarded to him for the purpose.