
Suresh Sankar Chavan Vs State of Maharashtra

Criminal Revision Application No. 86 of 1980

Court: Bombay High Court

Date of Decision: July 23, 1980

Acts Referred:

Bombay Police Act, 1951 " Section 110, 117#Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959 " Rule 4(2)#Bombay Prohibition Act, 1949 " Section 66(1), 85(1)#Evidence Act, 1872 " Section 72

Hon'ble Judges: Raja Bhonsale, J

Bench: Single Bench

Advocate: S.M. Kazi, for the Appellant; V.V. Kamat, Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

Raja Bhonsale J.

1. The petitioner in this revision application challenges the judgment and order passed by the learned Sessions Judge, Ratnagiri, confirming his

conviction u/s 66(1)(b) of the Bombay Prohibition Act. The learned Sessions Judge while confirming the conviction, reduced the sentence from

rigorous imprisonment for three months to simple imprisonment till rising of the Court and fine of Rs. 500/-, in default to suffer rigorous

imprisonment for two weeks.

2. In the trial Court the petitioner was tried in a Summary Case No. 318 of 1979 for having committed offences punishable u/s 66(1)(b) and 85(1)

of the Bombay Prohibition Act and also for having committed offences punishable u/s 110 read with section 117 of the Bombay Police Act.

3. The prosecution case in the trial Court was that the accused at the relevant time was driving a tanker belonging to the Zilla Parishad from bazar

area to Gadi-Adda at Pawas in Ratnagiri town itself. As the road near Gadi-Adda was a narrow one and as from the opposite direction a cart

driven by one Gangaram Mahadeo Alam was also coming, it was not possible for either of them to pass and, therefore, both of them stopped

there. A police constable by name S.L. Sawant on duty who happened to be there at the relevant time asked the accused to take his tanker in

reverse. The accused not only refused, but further, according to the prosecution, he is alleged to have threatened the cartman to death. The Police

Constable, Sawant, then called two other constables and with their help asked the accused to take his tanker in reverse and thereafter he was

taken charge of and they found that he was under the influence of alcohol. He was, therefore, taken to Ratnagiri Police Station where police

constable, Sawant, lodged his complaint against the accused. The accused was thereafter produced before the Medical Officer, Ratnagiri for

Medical examination and the Medical officer, Tapashalkar, examined the accused and found that he had consumed alcohol but was not under the

influence of alcohol. The blood which was taken by the Medical Officer was forwarded to the C.A., Bombay, who tested the blood and sent his

report to the Medical Officer, Ratnagiri, stating that the blood of the accused contained 0.069% w/v. of ethyl alcohol. This report is dated

February 6, 1979 and according to the contents of the report, the blood phial was forwarded along with the letter of the Medical Officer dated

January 17, 1979, and it was received in the Officer of the Forensic Laboratory in Bombay on 5th of February, 1979. On the basis of this C.A.

report and on the basis of the oral evidence led by the prosecution of Gangaram Mahadeo Alam, Police Constable, Sawant, and Medical

Certificate of Dr. Tapshalkar, the learned trial Magistrate came to the conclusion that the prosecution has failed to prove the offence u/s 85 of the

Bombay Prohibition Act as well as offence u/s 110 read with section 117 of the Bombay Police Act. He, however, convicted the accused for

having consumed prohibited alcohol and convicted him u/s 66(1)(b) of the Bombay Prohibition Act and sentenced him to suffer rigorous

imprisonment for three months and fine of Rs. 500/-, in default to suffer rigorous imprisonment for two weeks.

4. The petitioner-accused being aggrieved by the said order of conviction and sentence preferred criminal appeal No. 50 of 1979 in the Court of

Sessions Judge, Ratnagiri. Two contentions were raised on behalf of the accused in the Sessions Court. The first contention was that the offence

had taken place on 17-1-1979 and according to the report of the C.A. it was clear that the blood phial containing the blood of the accused was

received by the Forensic Science Laboratory on 5th of February, 1979 and, therefore, it was clearly a breach of Mandatory Rule-4 of the

Bombay Prohibition Rules. Rule 4(2) of the Bombay Prohibition Rules read as follows :

4(2)---The sample blood collected in the phial in the manner stated in sub-rule (1) shall be forwarded for test to the Testing Officer either by post

or with a special messenger so as to reach him within seven days from the date of its collection. It shall be accompanied by a forwarding letter in

Form "B" which shall bear a facsimile of the seal or monogram used for sealing the phial of the sample blood.

5. According to the contention raised on behalf of the accused in the Sessions Court that because there was a delay of more than seven days in

reaching the blood sample to the C.A. the certificate of the C.A. stood vitiated as there was breach of mandatory rule and, therefore, was

inadmissible in evidence and should not have been considered for the base of conviction of the accused u/s 66(1)(b) of the Bombay Prohibition

Act. The learned Sessions Judge, however, replying on the judgment in the case Narayan Krishnaji Marulkar and Another Vs. State, and also

referring to the reasoning given in a Gujarat case reported in Malahavarao Bhagwandas Kharade Vs. The State of Gujarat, came to the conclusion

that the purpose for which the Rule has been made, it seems that if the blood is collected and forwarded to the Chemical Analyser in a manner

which makes it possible to ascertain with accuracy the percentage of alcohol in blood at the time of its collection there was substantial compliance

with the provisions of Rule 4(2) and, therefore, the learned Sessions Judge relied on the ruling of the Bombay judgment that Rule-4 was directory

and not mandatory. The learned Judge, therefore, came to the conclusion that this particular observation in the Bombay judgment would go to

show that there was substantial compliance of Rules 3 and 4 and there was no need to go in for a mathematical calculation to say whether the phial

was sent within seven days or not and the dispatch of the phial after two weeks or so make a very little difference or no difference if there is

substantial compliance of Rule-4.

6. This controversy whether Rule 4(2) is mandatory or directory, in view of the difference of opinion between the Single Bench of the Gujarat High

Court and the Division Bench of the Bombay High Court, need not be dealt with. According to me, the point which goes to the root of the matter

is really a different one. Admittedly, one P.C. No. 5825 had taken this phial containing blood of the accused along with a letter from the Medical

Officer dated January 17, 1979. However, it was received by the Forensic Laboratory on February 5, 1979. It is not clear from the State of the

evidence on record which was recorded in a most unsatisfactory manner by the learned Magistrate as to where was the blood phial lying from 17th

January, 1979 until it was received by the Chemical Analyser, Forensic Laboratory, Bombay, on February 5, 1979. Surely, all these days could

not have taken for the police constable to travel from Ratnagiri to Bombay. Therefore, there is no guarantee that the blood phial which was sent by

the Medical Officer, Ratnagiri, was the same which was received by the Chemical Analyser, Bombay, on February 5, 1979.

7. In the absence of this identity being established, in my opinion, there remains a lacuna as the prosecution fails to connect the identity of the blood

sample which was taken from the person of the accused and the one ultimately came to be analysed by the Chemical Analyser between February

5, 1979, and February 6, 1979.

8. It is true that under the amended provisions of section 129-B of the Bombay Prohibition Act any document purporting to be a certificate under

the hand of the Chemical Analyser to the Government under may be used as evidence of the facts stated in such certificate, or as the case may be,

report, in any proceedings under this Act. This only means that the Certificate sent by the Chemical Analyser at Exh. 14 is used as evidence

regarding the facts stated therein. But still, the initial lacuna of connecting the identity of the sample of the blood sent by the Medical Officer and the

one which came to be analysed by the Chemical Analyser remains un established by the prosecution. If that is so, all the further discussion whether

the Rule 4(2) is mandatory or directory is fully unnecessary in the facts and circumstances of this case. It is, therefore, not possible to rely upon the

certificate issued by the assistant Chemical Analyser dated February 6, 1979, regarding the percentage of the alcohol found in the blood of the

accused as per Exh. 14. The learned Sessions Judge has discussed the question of the burden being shifted on the accused u/s 66(2) of the

Bombay Prohibition Act and he has not satisfactorily discharged the burden. However, that question does not arise in this case because the

prosecution has failed to prove that the blood which was collected from the person of the accused on January 17, 1979 was the same which was

ultimately sent and analysed by the Chemical Analyser and on this ground alone the accused is entitled to acquittal. The only conviction confirmed

by the Sessions Judge in appeal was u/s 66(1)(b) of the Bombay Prohibition Act. However, in view of what is stated above, the order of

conviction and sentence u/s 66(1)(b) of the Bombay Prohibition Act will have to be quashed and set aside. In the result, the criminal revision

application is allowed. Rule is made absolute. The accused will be entitled to refund of fine, if he has already paid any.