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**(1969) 10 BOM CK 0019**

**Bombay High Court**

**Case No:** None

Dnyanu Kondiba Kale

APPELLANT

Vs

State

RESPONDENT

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**Date of Decision:** Oct. 24, 1969

**Acts Referred:**

- Bombay Prohibition Act, 1949 - Section 85(1)(2)

**Citation:** (1970) CriLJ 1684

**Hon'ble Judges:** Nathwani, J; Abhyankar, J

**Bench:** Division Bench

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### **Judgement**

Abhyankar, J.

This revision has been referred to a Division Bench by the Hon"ble the Chief Justice at the instance of the applicant who challenges his conviction u/s 85 (1)(2) of the Bombay Prohibition Act under which he has been sentenced to undergo rigorous imprisonment for 1 month and to pay a fine of Rs. 100/- or in default to undergo rigorous imprisonment for 2 weeks.

2. The applicant was a police constable serving at Dhond. The prosecution case against him was that on 3rd September 1967 at about 6 p. m he entered a hotel called Hanuman Hotel in Gandhi Chowk and started abusing the hotel boys and beat one of them and also the son of the hotel-keeper. He was drunk. Finding the accused behaving in such a manner, the hotel owner Kishanlal contacted the police sub-inspector Shri Dodamani and reported the matter. The sub-Inspector went to the spot and saw that the accused was behaving in a disorderly manner. He brought the accused to the police station, but on the way also the accused behaved in a highly unruly manner. The accused was taken to the dispensary of one Dr. Tanwade, who examined the , accused and found that he was under the influence of liquor. Blood sample was taken of his blood and it was sent to the Chemical Analyser, but the Chemical Analyser could not send any satisfactory report on account of the condition of the blood. The accused was charged in summary trial before the

Judicial-Magistrate, First Class, Baramati, for having committed offence under Sections 66 (b) and Section 85 (1)(1), and Section 85 (1)(2), and Section 85 (1)(3) of the Bombay Prohibition Act. The accused pleaded not guilty. He denied that he had behaved in a disorderly manner. He admitted that he had gone to the hotel and thereafter he was taken to the dispensary and examined by a doctor. His case is that he had taken Ayurvedic medicine from his medical attendant Shri Apshankar Vaidya and it may be that on that account he was smelling of liquor but he denied having committed any offence.

3. At the trial the prosecution examined one by Murli, aged 12, the son of the hotel-keeper who testified about the accused's behaviour and stated that the accused spit on the ground and beat him and the other hotel boys one of them being Dasbrath. He stated that the accused was drunk and that he turned the table unpaid down. Mr. Dodamani who was called and who was P. S. I. also testified to the unruly behaviour of the accused while he was being taken from the hotel. Dr. Tanawade who examined the accused and had given certificate as per exhibit 16 also testified that he found the accused under the influence of liquor. He noted the symptoms and signs in the certificate. The prosecution also examined Vaidya Shri Apshankar and according to Shri Apshankar the accused was given a dose of Ayurvedic medicine in his presence and by such a dose the accused could never become intoxicated. The accused did not examine any witness on his own behalf. The learned Magistrate accepted the evidence brought by the prosecution and found the accused guilty u/s 85 (1)(2) of the Bombay Prohibition Act and sentenced him as already stated.

4. Against this conviction and sentence, the accused preferred an appeal which was heard and decided by the Additional Sessions Judge, Poona. The learned Additional Sessions Judge has confirmed the finding of the trial Court that the allegation that the accused behaved in disorderly manner was fully established by the evidence of Murli as well as P. S. I. Shri Dodamani. The learned Judge also pointed out the evidence of Shri Dodamani about the disorderly behaviour of the accused while he was being taken to the police station and to the dispensary. Mr. Dodamani had testified that as soon as he went to the hotel, he found that the accused was sitting in the hotel unable to keep his balance, smelling of liquor and his eyes were red. The accused was also shouting and struggling when he was being taken to the police station and to the medical officer. In fact, as many as 4 constables had to be called for help to keep the accused under control. The learned Judge rejected the defence of the accused that it was on account of enmity with Shri Dodamani that a false charge was brought against him. The appeal was, therefore, dismissed.

5. The applicant thereafter filed revision application in this Court and it seems to have been argued when the revision was heard in the first instance that with the acquittal of the accused from the charges u/s 85 (1)(1) and Section 85 (1)(3) of the Bombay Prohibition Act is made, the conviction u/s 85(1)(2) of the Act could not

stand. For this proposition, reliance was placed before the Hon"ble the Chief Justice on a decision of this Court in Criminal Revn. Appln. No. 664 of 1958 (Bom). As the learned Counsel for the accused relied on this decision, the matter was referred to the Division Bench to have his contention examined.

6. The copy of the judgment in the Criminal Revn. Appln. No. 664 of 1968"(Bom) which is delivered by the learned single Judge (Vaidya J.) has been appended to the paper book. Having carefully gone through the judgment we do not find it laying down anywhere the proposition in the terms in which it seems to have been canvassed by the learned Counsel for the applicant that when a person is charged with offences under Sections 85 (1)(l), 85 (1)(2) and 85 (1)(3) and is acquitted of offences under Sections 85 (1)(1) and 85 (1)(3) of the Bombay Prohibition Act, his conviction, if any, u/s 85 (1)(2) of the Act must also fail. There is no such proposition in this judgment. In fact, it would appear from the facts reproduced in sufficient details in the judgment of the High Court that it was on account of a finding reached by the learned Sessions Judge and the observations made by the Sessions Judge that the maintenance of conviction of the accused in that case u/s 85 (1)(2) of the Bombay Prohibition Act was held to be untenable. In para 6 of the judgment of the Sessions Court in that cage the learned Sessions Judge has observed as follows:

On the evidence itself it is clear that the accused was walking on his own. Therefore, it will be difficult to say that the accused was under the influence of the drink and was not able to take care of himself which would justify his conviction u/s 85 (1)(1). Similarly, it could not be said that he was found to be drunk...

7. Though the learned Sessions Judge had affirmed the conviction of the accused in that case u/s 85 (1)(2) it was urged that that conviction was untenable in view of the finding of the learned Sessions Judge himself, namely, that it was difficult to say that the accused was under the influence of drink. If it could not be said that the accused was under the influence of drink, naturally one of the two ingredients required to be proved for substantiating the charge u/s 85 (1)(2) was wanting in the case and conviction could not, therefore, be supported. In pointing out this contradiction, the High Court observed as follows:

If that order of acquittal must stand then the order of conviction passed by the Sessions Judge under Sub-clause (2) of Sub-section (1) of Section 85 of the Act must be set aside because the learned Sessions Judge having held that it could not be said that the accused was found to be drunk or under the influence of drink and was unable to take care of himself, could not record a finding that he behaved in a disorderly manner under the influence of drink as required under Sub-clause (2) of Sub-section (1) of Section 85.

After carefully reading the judgment it is clear that the conviction u/s 85 (1)(2) of the Bombay Prohibition Act had to be set aside in that case because of loose expression used by the Sessions Judge, from whose appeal revision was preferred and was

being considered that it could not be said that the accused was under the influence of drink. We may also observe that the learned Sessions Judge in that case failed to make the clear distinction used in the phraseology of 3 Sub-clauses of Sub-section (1) of Section 85 of the Bombay Prohibition Act. Under Sub-clause (1) and Sub-clause (3) of Sub-section (1) of Section 85 the word used is "drunk" and is well understood; there is a clear distinction between describing a person as "drunk" and describing a person as "being under the influence of drink." This distinction has been brought out in a Division Bench of this Court when the Chief Justice pointed out in [State Vs. Trimbak Dhondu Bhoir](#), that in order to hold that a person can be held to be guilty of being drunk u/s 85 (1)(8) of the Bombay Prohibition Act, 1949, it is not sufficient that he should merely smell of alcohol. There must be some evidence produced by the prosecution beyond the fact of his having drunk alcohol, thereby smelling of alcohol, which would induce the Court to hold that he is overcome by drink or is in a state of intoxication, A person may be under the influence of drink as required by Sub-clause (2) of Sub-section (1) of Section 85, if he behaves in a disorderly manner under the influence of drink. We would also like to point out that punishment prescribe 1 for a person found guilty of offence under Sub-clause (1) of Section 85 of the Bombay Prohibition Act is much less than the punishment prescribed for a person who is found to have committed an offence u/s 85 (1)(2) and Section 85 (1)(8). It has a larger social impact if a person found under the influence of drink behaves in a disorderly manner in a public place or a place where the public has access; the consequences of his action in society make it an aggravated form of the offences grouped u/s 85. Once this distinction is kept in mind, it is not the degree of inebriety that determines the gravity of the offence but it is its consequences flowing from it which make it punishable. The various sub-clauses of Sub-section (1) of Section 85 undoubtedly make a distinction as to the effect of consumption of liquor on a person. It is not enough for the prosecution to prove one of the ingredients of the offence u/s 85 (1)(2) namely, that a person is under the influence of drink. Prosecution has to prove in addition "disorderly behaviour."

8. In our opinion, therefore, the decision relied upon by the learned Counsel for the applicant has no bearing and has no relevance to the proposition that since there is acquittal u/s 85 (1)(1) and Section 85 (1)(8), the conviction u/s 85 (1)(2) cannot be sustained against the accused as no such proposition arises either from the judgment of the High Court or by the construction of Section 85 of the Bombay Prohibition Act.

9. We have heard the case on merits and we do not see that there is any error committed by either of the two Courts in reaching the conclusion about the guilt of the accused.

10. The result is that the revision fails and is dismissed,