

(1970) 07 BOM CK 0021
Bombay High Court (Nagpur Bench)
Case No: None

State of Maharashtra

APPELLANT

Vs

Namdeo Dhannu

RESPONDENT

Date of Decision: July 16, 1970**Acts Referred:**

- Bombay Prohibition Act, 1949 - Section 85(1)(3)
- Penal Code, 1860 (IPC) - Section 277

Citation: (1971) CriLJ 1000**Hon'ble Judges:** Bhole, J**Bench:** Single Bench

Judgement

Bhole, J.

The State has come in appeal against an order of acquittal passed by the Sessions Judge, Wardha, in an appeal allowing it against the judgment passed by the Judicial Magistrate First Class, Wardha, convicting the accused u/s 85 (1) (3) of the Bombay Prohibition Act and sentencing him to suffer rigorous imprisonment for one month and also to pay a fine of Rs. 25/-.

2. The accused Namdeo is a pointsman working in the railway. It appears that on 17-8-1967 at about 3-15 P. M. the accused came from the branch-line with a cycle in his hand. At that time two other railway workers Janardhan and Babulal were working near the B cabin in the Wardha railway yard. The accused came and dashed against these two persons. Janardhan and Babulal objected to his conduct, but the accused retaliated and assaulted Babulal. One Umashankar who was on duty there intervened but he was also beaten. The accused did all this in a drunken state. The railway police station therefore was informed and the Head Constable of the railway police station arrived there. The Head-constable then took the accused to the police station. He was thereafter sent for medical examination. After the necessary investigation, he was charge-sheeted for offences punishable u/s 66 (1) (b) and also

u/s 85 (1) (3) of the Bombay Prohibition Act. The learned Magistrate relying on [Karansingh Balubha Vs. State of Gujarat](#), was of the view that the prosecution ought to establish that the report indicating the percentage of alcohol in the blood must be established as that of the accused and that it was obtained by the doctor himself and sent the blood phial to the Chemical Analyser. According to him, the blood phial was sent by the doctor through the police agency and therefore the Chemical Analyser's report obtained in this way should be treated as inadmissible in evidence. This Court has held in Criminal Revn. Appln. No. 23 of 1969 decided on 17/18-4-1969 (Bom.) that the Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959, are directory and not mandatory and that a substantial compliance should be regarded as sufficient. Even if the police constable is Medical Officer's messenger to reach the blood phial, Rule 5 will be complied with. The learned Magistrate's view therefore is erroneous. But holding an erroneous view as he did, the learned Magistrate acquitted the accused for the offence punishable u/s 66 (1) (b) of the Bombay Prohibition Act; but he found that the accused has committed an offence punishable u/s 85 (1) (3) of the said Act. The matter went up in appeal and the learned Sessions Judge, after considering the evidence, came to the conclusion that the railway yard, where the B cabin was, cannot be treated as a public place. According to him it is not even a place where the public are permitted to have access as contemplated within the meaning of Section 85 (1) (3). Therefore, he allowed the appeal and set aside the order of conviction against the accused u/s 85 (1) (3). It is against this order of acquittal that the State has come here in appeal. The only point therefore, that arises here for consideration is to see whether the order of the learned Sessions Judge is legal and proper.

3. The only point for decision here is whether the place where B cabin in the Wardha Railway Yard is situated is or is not public place or is or is not a place to which the public have or are permitted to have access. The result of this appeal, therefore, will depend upon the answer to this question. Now it is true that u/s 3 (4) of the Indian Railways Act, "railway" means a railway, or any portion of a railway, for the public carriage of passengers, animals or goods, and includes all land within the fences or other boundary marks indicating the limits of the land appurtenant to a railway. The phrase "railway" also includes all lines of rails, sidings or branches worked over for the purposes of, or in connection with a railway. That word also includes all stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery and other works constructed for the purposes of, or in connection with, a railway. Evidently, therefore, the word "railway" includes also the railway lines as well as the place near the B cabin in the railway yard. This is a place on the railway track where generally cabin signals are worked. It is also true that u/s 122 (1) of the Indian Railways Act if a person unlawfully enters upon a railway, he shall be punished with fine which may extend to twenty rupees. u/s 122 (2) if a person so entering refuses to leave the railway on being requested to do so by any railway servant, he is also punished with a fine. It is on the basis of these provisions in the Indian Railway Act

that the learned Sessions Judge has held that a railway yard and the place near the B cabin where the accused was found drunk is neither a public place nor even a place where the public have access as contemplated by Section 85 (1) (3) of the Bombay Prohibition Act. The learned Government Pleader, however, contests this view and argues that the view of the learned Sessions Judge is erroneous. On the other hand, the learned advocate for the accused says that place cannot be said to be a public place as contemplated under the provisions of the Bombay Prohibition Act.

4. Looking at the provision itself. Section 85 (1) (3) of the Bombay Prohibition Act is as follows:

85. (1) Whoever in any street or thoroughfare or public place or in any place to which the public have or are permitted to have access

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(3) is found drunk but who is not the holder of permit granted under the provisions of that Act or is not eligible to hold a permit Under Sections 40, 41. 46 or 46A shall, on conviction, be punished.

Therefore- we have to see whether the railway yard and the place near the, B cabin on the railway track is or is not a public place or any place to which the public have or are permitted to have access. The legislature described" the place in two ways. At one place they used the expression "public place" and at another place "any place to which the public have or are permitted to have access". Therefore, if any offence is committed at a "public place", the accused can be hauled up. The accused can also be hauled up if any offence is committed at "any place" which may not be a public place but to which the public have or are permitted to have access. Therefore if the railway yard is shown to be "any place to which the public have access", or if it is shown to be "any place to which the public are permitted to have access", then the accused can be said to have committed an offence. In Stroud's Judicial Dictionary (Third Edn. P. 19), the meaning of the words "public access to a place" means a place "open to all the public in fact, whether by right or permission" and does not necessarily connote that this must be as of right. Such a definition was given in Young v. Neilson (1893) 20 Retie 62. The words used in Section 85 of the Bombay Prohibition Act are. "any place to which the public have or are permitted to have an access." These words will. therefore, mean that the place must be such that it should be open to the public in fact. whether by right or permission. The access need not also necessarily connote that it should be as of right according to the definition given in the Stroud's Judicial Dictionary.

5. We have certain decided cases also wherein these expressions as are used in Section 85 are interpreted. In Ramkaranlal v. Emperor 13 Nag LR 68 : AIR 1916 Nag 15 the expression "public place" was interpreted. This was with reference to Section 277 of the Indian Penal Code. Section 277 deals with fouling water of public spring

or reservoir. The Judicial Commissioners cited *Queen v. Wellard*. (1884) 14 QBD 63. and observed that a place was construed in that case as a public place if people are allowed access to it. though there may be no legal right to it. So, a well is a public well, if people are allowed to use its water. Therefore, a place, according to this citation, would be a public place if persons are allowed access to it even though there may be no legal right to it. In *re Muthuswami Iyer* AIR 1937 Mad 286, the Madras High Court held with reference to Section 159, IPC that a public place would be a place where public are actually in the habit of going. It was observed: "Whether a place is public or not does not necessarily depend on the right of the public as such to go to the place, though of course a place to which the public can go as of right must be a public place. The place where the public are actually in the habit of going must be deemed to be public for the purpose of the offence of affray,.....". Therefore a place where the public habitually go can, at any rate, be deemed to be a place where public have access. The question, therefore, would be whether the railway yard or the place on the railway track near B cabin is a place where public are habituated to move. The expression "a place accessible to the public" was also considered in *Cawash M. Shroff v. G. I. P. Rly. Co.* ILR (1902) Bom 609. A question arose there as to whether Wadi Bundar goods station in Bombay was a place accessible to the public. Their Lordships answered this question in the affirmative. According to this view, the goods yard was no doubt a public place though the public may have a limited right of access, but, as a fact, no one is prevented from going inside the yard. Their Lordships in that case relied on *Ex parte Kippins* (1897) 1 QB 1. We have in the instant case the railway yard where the public have a limited right of access, but, as a fact, no one is prevented from going either on the track of the railway or at the place where these cabins or railway yards are. The Gujarat High Court in [State Vs. Dohana Jamnadas and Others](#), was also considering the phrase "public place" with reference to Section 12 of the Bombay Prevention of Gambling Act. The test, according to that High. Court, of a place being a public place, is whether it is open to the members of the public or not, even though there may be certain conditions attached to the entry or the use thereof. What is required is that such a place must be open for entry by an indeterminate number of members of the public and must not be open only to a definite or a determinate number. Thus railway platforms, according to that High Court, are places to which any member of the public has and is permitted to have access and the fact that a platform pass is necessary for one to enter into such a platform makes no difference as the platforms are for the use and benefit of the public and the members of the public are therefore permitted to have access to such platforms.

6. It is true that Sir Lawrence Jenkins in *Emperor v. Hussein Noor Mahomed* ILR (1906) Bom 348 took a view in 1905 that a railway carriage was not a public place. That view, however, was on the basis of Section 12 as it was before the Bombay Prevention of Gambling Act was amended in 1910. The words used in Section 12 before its amendment in 1910 were as follows:

A Police officer may apprehend without warrant any person foundin any public street. place or thoroughfare.....

There was however an amendment to it by the Amending Act of 1910 (Bom. 1 of 1910). The words "place or thoroughfare" were substituted by "or thoroughfare, or in any place to which the public have or are permitted to have access." Sir Lawrence Jenkins was therefore not construing in that case the phrase "in any place to which the public have or are permitted to have access". He was only construing in that case the phrase "any public street or a place or a thoroughfare". The phrase "an open and public place in which the public have or are permitted to have access" was also construed in *Langrish v. Archer* 1882(10) QBD 44. with reference to the Vagrant Act Amendment Act, 1873 It was held there that a railway carriage while travelling on its journey was within the definition of "an open and public place to which the public have or are permitted to have access" in the section.

7. It appears to me, therefore. that the phrase in Section 85 of the Bombay Prohibition Act "in any place to which the public have or are permitted to have access" will govern a rail-way yard where, in my view, although the public may not have a right to go, yet are allowed habitually to move around that place. It may be that the members of the public have a limited right of access to such a place; but normally nobody is prevented from going to that place. In fact, the members of the public are also habituated to move round that place, If the railway yard is. therefore, a place where the members of the public are habituated to move round and when they move, nobody is prevented from going there, it can as well be included in any place to which the public have an access. If that is so, then, in my view, the finding of the learned Sessions Judge is erroneous. I have, therefore, to allow this appeal.

8. I, therefore, allow this appeal, set aside the order of acquittal passed by the learned Sessions Judge and restore the order passed by the Judicial Magistrate. First Class. Wardha. convicting the accused-respondent u/s 85 0) (3) and sentencing him to suffer R.I. for one month and a fine of Rs. 25/-, i/d. R.I. for 1 week. The accused-respondent therefore should surrender bail within eight days