

(1970) 02 BOM CK 0047

Bombay High Court (Nagpur Bench)**Case No:** Criminal Revision Application No. 295 of 1969

Ayodhyaprasad Nathulal Jaiswal

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision: Feb. 20, 1970**Acts Referred:**

- Bombay Prohibition Act, 1949 - Section 12, 18, 24A, 59A, 60

Citation: (1970) 72 BOMLR 901 : (1970) MhLj 498

Hon'ble Judges: Bhole, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Bhole, J.

The original accused has come in revision being aggrieved by the order passed by the learned Sessions Judge, Yeotmal, dismissing his appeal against his conviction by the Judicial Magistrate, First Class, Kelapur. He is convicted of an offence punishable u/s 66(1)(b) of the Bombay Prohibition Act for being found on April 26, 1968 with 14 four-ounce bottles of liquor. The case of the prosecution was that P. S. I. Patil of Ghatanji Police Station in district Yeotmal, was waiting on information at the motor-stand for the arrival of the applicant. He was expected to bring liquor and therefore they were waiting for him. He arrived at the bus-stand at about 4.80 A.M. carrying a bag in his hand. He was, therefore, accosted and his bag searched. It was found to contain 14, four-ounce bottles, bearing the label "Lavender 999". The bottles had common seals. These bottles were seized from the possession of the applicant. The matter was investigated and the sample from these bottles was sent to the Chemical Analyser for report. The Chemical Analyser's report showed that it contained 15% v/v of ethyl alcohol in water. A charge-sheet was thereafter filed against the applicant.

2. The applicant's plea was that the contraband articles were foisted upon him. The learned Magistrate after hearing the evidence came to the conclusion that the prosecution have established the guilt against the applicant and accordingly convicted him and sentenced him to rigorous imprisonment for four months and also to pay a fine of Rs. 500.

3. This order was challenged by the applicant before the Court of the learned Sessions Judge, Yeotmal. The learned Sessions Judge also came to the conclusion that the prosecution had established the guilt of the accused because, according to him, the defence that the prosecution had not established that the bottles contained Lavendar which was fit for consumption was neither taken nor pleaded before the trial Court. According to him, there was nothing on record also to show that these bottles were really prepared by the manufacturing company of Hyderabad and that it was not difficult to affix such spurious labels and sell them in the guise of Lavendar and tonic. Accordingly, therefore, he dismissed the appeal. This order, therefore, is challenged here now. The only point, therefore, that arises here for consideration is to see whether this order of the learned Sessions Judge is legal and proper.

4. It is true that the applicant had not taken up a defence in the trial Court that the contraband articles found with him were medicinal preparations or that they were toilet preparations. It is also true that the circumstance of the finding of the medicinal preparation with the applicant was only argued at the stage of the first appeal. But since this is a point of law, I think, that point could have been raised even at the stage of the first appeal and that could also be raised in this revision application. Now, so far as the facts of this case are concerned, admittedly, 14 four-ounce bottles were found and it is established by the evidence that these bottles were found in the possession of the applicant. Each of these bottles, however, bore the seal of the manufacturing company. The manufacturing company's name is "COSMO PHARMA MFG. CO. HYDERABAD A.P.". All these bottles also bore a label "115 ML Lavendar 999, Superior, for external use only, ALC 185 to 143 PS, COSMO PHARMA MFG. CO. HYDERABAD A. P. LA 88 B. No. ". It is, therefore, now argued that this is prima facie a toilet preparation containing alcohol and therefore Section 6-A as well as Section 24A of the Bombay Prohibition Act will be attracted. Section 6-A deals with the Board of Experts who have to determine whether any medicinal or toilet preparation containing alcohol, or any antiseptic preparation or solution containing alcohol or any flavouring extract, essence or syrup containing alcohol, is an article fit for use as intoxicating liquor. u/s 6-A(b) it shall be the duty of the Board to advise the State Government on the question whether any medicinal or toilet preparation etc. is fit for use as intoxicating liquor and also on any matters incidental to the question referred to it by the State Government. On obtaining such advice, the State Government shall determine whether any such article is fit for use as intoxicating liquor, and upon determination of the State Government that it is so fit, such article shall, until the contrary is

proved, be presumed to be fit for use as intoxicating liquor. Under Clause (1) of Section 6-A, until the State Government has determined as aforesaid any article mentioned as medicinal or toilet preparation to be fit for use as intoxicating liquor, every such article shall be deemed to be unfit for such use.

5. Now, admittedly, "115 ML Lavendar 999, Superior" is not to be found in the Schedule of the list of medicines and toilet preparations containing alcohol which are capable of being consumed as ordinary alcoholic beverages. In other words, there is no determination by the State Government on the advice of the Board of Experts that "115 ML Lavendar 999, Superior" is a toilet preparation containing alcohol which is capable of being consumed as ordinary alcoholic beverage. The point, therefore, that arises here for consideration is whether the prosecution had a burden to discharge in establishing that "115 ML Lavendar 999, Superior" was or was not fit for consumption as per the advice of the Board of Experts. It is contended by the learned advocate for the applicant that in the facts and circumstances of our case it was very necessary for the prosecution to establish that this Lavendar found with the accused was fit for use as intoxicating liquor. On the other hand, it is contended by the Assistant Government Pleader that it was not necessary at all.

6. Now, in a criminal prosecution, normally, the burden lies upon the prosecution to establish all the ingredients which constitute the offence charged against the accused. There is nothing in the provisions of the Bombay Prohibition Act which indicates that a different rule has to be followed in prosecuting the accused under any of the provisions of that Act. In the absence of any provision to the contrary, therefore, in a prosecution for an offence under the Bombay Prohibition Act, it is for the State Government to prove that the substance, if a medicinal preparation or a toilet preparation, was not unfit for use as intoxicating liquor and that the applicant had infringed the prohibitions contained in Sections 12 and 18 of the Act, But the learned Assistant Government Pleader says that it is true that the prosecution has to discharge the burden of proving all the ingredients which constitute the offence, but it is not necessary in a case where the accused does not even raise a plea that he is in possession of a medicinal or toilet preparation. According to him, the prosecution has no burden to discharge in that circumstance to prove the nature of the medicinal or the toilet preparation. In so far as the instant case is concerned, admittedly the applicant was found with sealed bottles, sealed with the seal of the manufacturing company. The descriptions show that they were properly branded bottles. Prima facie, therefore, these bottles clearly showed that they were manufactured by COSMO PHARMA MFG. CO. HYDERABAD in Andhra Pradesh and the sealed bottles contained a kind of Lavendar, "Superior". If, therefore, when the applicant was found in possession of this Lavendar, was it not necessary for the prosecution either to establish that the labels and brand was spurious and bogus or that the Lavendar was classed as a toilet preparation not unfit for use as intoxicating liquor? In my view, the burden does lie on the prosecution to prove all the

ingredients which constitute the offence with which the applicant was charged.

7. Now is it necessary that the applicant should raise a defence and explain that he was found in possession of only a medicinal preparation or a toilet preparation and that therefore, he was not in possession of an intoxicating liquor ? In a given case, the accused in a criminal prosecution can as well be silent. It is not necessary for him to explain any incriminating circumstance. It may be that in certain circumstances we consider the silence of the accused. But it is not a rule of law that if the accused sits silent and does not explain any incriminating circumstance, the prosecution burden becomes less. The prosecution has always a burden and that burden is to prove all the ingredients which constitute the offence charged against the accused. They have to discharge this burden and establish the charge beyond a reasonable doubt. In this case when the facts and circumstances show that the applicant was found with a kind of Lavendar, in my view, it was necessary for the prosecution to establish that either this Lavendar was fit for use as intoxicating liquor or that the brand and labels are bogus and spurious. It is not enough for the prosecution only to show that the contents of the sealed bottles contained a particular percentage of ethyl alcohol with water.

8. The learned Assistant Government Pleader relies on certain observations made by my learned brother Mr. Justice Chandurkar in State v. Gulab Sukhdeo (1969) Criminal Appeal No. 109 of 1968, decided by Chandurkar J. on August 21, 1969 (Unrep.). This was a case u/s 66(1)(b) and Section 85(1)(3) of the Bombay Prohibition Act. The concentration of alcohol in the blood of the accused according to the prosecution was 0,188% W/V of ethyl alcohol. In the circumstances of that case the burden was cast on the accused u/s 60(2) to establish that he had consumed actually a medicinal or a toilet preparation the consumption of which was not in contravention of any Act or any rules, regulations or orders made thereunder. In that context, my learned brother after citing Section 24-A of the Bombay Prohibition Act observed as follows :

The applicability of section 24-A therefore, does not depend merely on the fact whether an article has been or has not been declared fit or unfit for use as intoxicating liquor, but there is a further condition which is required to be satisfied and established that the article in respect of which such an exemption is claimed corresponds with the description and limitations mentioned in suction 50A...

Unless, therefore, particular medicinal preparation which the accused claims to have consumed is shown to be within the four corners of section 59-A and it is unfit for use as intoxicating liquor, the bare statement that a particular medicinal preparation has been consumed is no valid defence to a prosecution u/s 66(1)(b) of the Act and in such a case the presumption u/s 66(2) cannot said to have been rebutted.

It is, therefore, argued by the learned Assistant Government Pleader that these observations clearly show that the burden lies on the accused-applicant to establish that the Lavendar which he was carrying was unfit as intoxicating liquor. It is difficult for me to agree with the learned Assistant Government Pleader because my learned brother there was concerned with the burden to be discharged by the accused in the circumstances of that case and not with the burden of the prosecution. Here we are concerned with the burden on the prosecution because the prosecution has to discharge the burden of showing that he was found in possession of prohibited alcohol. Therefore, the accused had no burden to discharge and show that he was carrying a toilet preparation which was unfit for use as intoxicating liquor or that as u/s 24-A the articles in his bottles contained the specified elements of alcohol as mentioned in Section 59-A of the Bombay Prohibition Act. In this view of the matter, therefore, the contention of the learned Assistant Government Pleader is without substance.

9. We have also a case in [Ratan Lal Vs. The State of Maharashtra](#), wherein their Lordships were considering the case of certain Ayurvedic medicinal preparations. The accused there also was prosecuted for the offence punishable u/s 66(1)(b) of the Bombay Prohibition Act. The Supreme Court has discussed this case of possession of toilet or medicinal preparations and the rules of evidence incorporated in Section 6-A of the Bombay Prohibition Act and how the medicinal or toilet preparation is to be established as an intoxicating liquor.

10. The learned Sessions Judge has also mentioned during the course of his judgment that in the instant case there was nothing to show that the contents of the bottles were really prepared by the manufacturing company of Hyderabad and that it was quite easy to affix such spurious labels and seals on them in the guise of Lavendar and tonics. In the instant case, as mentioned by me, the sealed bottles found in the possession of the applicant prima facie do show that their content was a kind of Lavendar manufactured by a named company in Hyderabad. For all purposes, they appeared to be well branded bottles. If the investigating authority had led evidence to show that the COSMO PHARMA MANUFACTURING COMPANY, HYDERABAD never existed or that the COSMO PHARMA MANUFACTURING COMPANY of Hyderabad does not manufacture such kind of Lavendar or that if they manufacture such kind of Lavendars, they did not send such goods to the applicant, then it was a different case. But in the absence of any such evidence, it would not be reasonable to surmise that those bottles were merely affixed with spurious labels or that those bottles were never manufactured by any such company at Hyderabad.

11. For the aforesaid reasons, therefore, I am unable to uphold the order passed by the learned Sessions Judge as well as the order of conviction passed by the learned Judicial Magistrate. The order of conviction, therefore, is set aside and the applicant-accused is acquitted of the offence with which he was charged. The fine, if paid, should be refunded. Bail bonds are cancelled. Revision application is allowed.