

## Raja Ram vs State on 8 October, 1953

**Equivalent citations: 1954CRILJ455, AIR 1954 ALLAHABAD 214**

ORDER

Brij Mohan Lall, J.

1. This is a reference by the learned Additional Sessions Judge of Shahjahanpur under Section 438 of the Code of Criminal Procedure recommending that the accused Raja Ram's conviction recorded by a learned magistrate of that district be set aside and that the case against him be directed to be retried.

2. The accused was tried under Section 60(a) of the Excise Act. The charge brought against him was that a bottle containing illicit liquor was recovered from his house. At the time on arguments before the learned magistrate it was pointed out by the accused's counsel that there was no evidence to prove that the liquor found to the bottle was illicit. The learned Magistrate thereupon ordered that the Excise Inspector who had made the recovery should be examined. It was found on enquiry that the Excise Inspector had been transferred to Tehri. There was, however, on the record a report by the said Excise Inspector. The learned magistrate examined the Excise clerk who said that he identified the signature & the writing of the Excise Inspector and that he was present when the Excise Inspector examined the strength of the liquor with the help of a hydrometer. Beyond this he was unable to say. He could not say that the strength discovered by the Excise Inspector was that of illicit liquor.

3. The learned judge has pointed out that this evidence was not sufficient to prove that the liquor was of illicit origin. I am in entire agreement with the learned judge. If the fact in issue before the learned magistrate had been as to whether or not the report was in the handwriting of the Excise Inspector, it was not necessary to examine him personally. Any one familiar with his handwriting could prove this fact. The Excise Clerk, who had presumably seen him writing on previous occasions, could certainly prove the handwriting. But the fact in issue in the present case was not whether the report was to the Excise Inspector's handwriting but whether the liquor was of illicit origin. It was the Excise Inspector himself, and not the Excise Clerk, who could swear that the liquor possessed forbidden strength. That was a fact about which the Excise Inspector alone could depose.

Moreover, his evidence could not be of much use unless it was tested in cross-examination. By keeping the Excise Inspector out of the witness box and by using his report against the accused the learned magistrate deprived the accused of the advantage of testing the accuracy of the Excise Inspector's opinion by questions in cross-examination. The report itself, in the absence of circumstances which would make it admissible under Section 32 or some other section of the Evidence Act, could not take the place of the sworn statement of the maker thereof. In the present case I am of opinion that Tehri was not such a far distant place that the Excise Inspector could not

conveniently come from there to Shahjahanpur to give evidence. In the circumstances the prosecution failed to prove that the liquor was illicit.

4. While I have agreed with the learned Sessions Judge so far, I cannot accept his suggestion that the case should be sent back for retrial. There is no reason why the prosecution should be given a fresh opportunity to fill up the lacuna in evidence. If it failed to produce the right type of evidence, it should suffer the consequences thereof.

5. The reference is accepted in part. The conviction and sentence are set aside. The fine, if recovered, shall be refunded.