State Of Andhra Pradesh vs Madiga Boosena & Ors on 2 May, 1967

Equivalent citations: 1967 AIR 1550, 1967 SCR (3) 871, AIR 1967 SUPREME COURT 1550, 1967 ALL. L. J. 354, 1967 MADLW (CRI) 103, 1968 (1) SCJ 160, 1967 BLJR 356, 1967 2 ANDHLT 6, 1967 (1) SCWR 235, 1967 (1) SCR 353, 1967 3 SCR 871, 1968 MADLJ(CRI) 12, 1967 (1) SCJ 830

Author: C.A. Vaidyialingam

Bench: C.A. Vaidyialingam, M. Hidayatullah

PETITIONER:
STATE OF ANDHRA PRADESH

Vs.

RESPONDENT:
MADIGA BOOSENA & ORS.

DATE OF JUDGMENT:
02/05/1967

BENCH:
VAIDYIALINGAM, C.A.
BENCH:
VAIDYIALINGAM, C.A.
HIDAYATULLAH, M.

CITATION:
1967 AIR 1550 1967 SCR (3) 871
CITATOR INFO :
D 1974 SC 639 (6,7,8,10,12,13)

ACT:
Andhra Pradesh (Andhra Area) Prohibition Act, 1937 (Act 10 of 1937) S. 4(1)(a)-Seized commodity not chemically examined-Witnesses' smell, if conclusive proof-

HEADNOTE:
The respondents were prosecuted under S. 4(1)(a) of the Andhra Pradesh (Andhra Area) Prohibition Act, on the allegation that they were found transporting arrack. The respondents denied the offence and pleaded that a mere statement by the witnesses that there was a strong smell of arrack, emanating from the tins, when they were pierced was

not sufficient to establish that the tins contained arrack and that the samples of the commodity should have been sent for opinion of the Chemical Examiner. The trial and the appellate courts rejected the respondents' pleas and convicted them but the High Court acquitted them. In appeal, to this Court.
HELD : The prosecution has not established that the respondents were guilty under s. 4(1)(a) of the Act.
Merely trusting to the smelling sense of the Prohibition Officers, and basing a conviction, on an opinion expressed by those officers, could not justify the conviction of the respondents. Better proof, by a technical person, who bad considered the matter from a scientific point of view, was not only desirable, but even necessary, to establish -that the article seized was one coming within the definition of 'liquor'. [874-E]
Baidyanath Mishra v. The State of Orissa, Crl. Ap. No. 270/1964
on 17-4-1967; distinguished.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 6 of 1965.

Appeal by special leave from the Judgment and order dated January 17, 1964 of the Andhra Pradesh High Court in Criminal Revision Case No. 215 of 1963.

P. Ram Reddy and K. Javaram, for the appellant. The respondent did not appear.

The Judgment of the Court was delivered by Vaidialingam, J. In this appeal, by special leave, on behalf of the State of Andhra Pradesh, the appellant herein, Mr. P. Ram Reddy, learned counsel, challenges the order dated January 17, 1964, of the Andhra Pradesh High Court, setting aside the conviction of the respondents, for an offence under s. 4 (I) (a), of the Andhra Pradesh (Andhra Area) Prohibition Act, 1937 (Act X of 1937), hereinafter called the Act.

L9Sup. Cl/67-12 According to the prosecution, the respondents were found transporting, in a bullock cart, on the early morning of June 10 1962 fifty gallons of arrack. It is the case of the prosecution that the prohibition staff found, on the day in question, a bullock cart, driven by the first respondent, in which the fifty gallons of arrack were found in 13 tins. Accordingly, they were prosecuted for an offence under s. 4 (1)(a), of the Act. All the respondents substantially denied, having committed the offence, with which they were charged.

The prosecution let in the evidence of the Prohibition Sub- Inspector, P.W.1, and another petty officer of the prohibition staff, P.W.4. The evidence of these two witnesses, was to the effect that when the bullock cart, in question, came near them, there was a smell of arrack. In particular, P.W.4 has stated that the tins, which were in the bullock cart, were pierced with bayonet, and when smelt,

they gave a strong smell of arrack. To corroborate the evidence of these two officers, the other witnesses,. P.Ws. 2 and 3, who were stated to have witnessed this occurrence, along with the prohibition party, were also examined. They stated that when the bullock cart came near them, they got a strong smell of arrack, and that the 12 tins were pierced with bayonet ends and their contents verified. Only some of the witnesses have been cross-examined, and the respondents, have suggested to them that during that hour of the night, it would not have been possible for them to identify the persons, who were stated to have been in the bullock cart. No doubt, no specific suggestion, that the commodity that was seized, is not one to which the Act applies, has been made. During the trial, however the question appears to have been raised, among other contentions, that the prosecution has not established the necessary ingredients for establishing that the respondents have committed the offence, under s. 4(1) (a), of the Act. The trial Court, adverting to this aspect, has referred to the evidence of P.Ws.1 to 4, who speak- to a strong smell of arrack, emanating from the cart, and the tins being pierced with bayonet ends. In view of this evidence, the trial Court is of the opinion that the ground for coming to the conclusion, that it was arrack that was being transported, is established. Ultimately, the trial Court accepted the evidence of the prosecution, found the respondents guilty of the offence under s. 4 (I) (a) of the Act, and sentenced each of them to undergo rigorous imprisonment for six months.

The respondents challenged their conviction, before the learned Sessions Judge, Kurnool. Before the appellate Court also, the respondents pleaded that there is no proper proof, in this case, that the tins contained arrack. A mere statement, by the witnesses, that there was a strong smell of arrack, emanating from the tins. when they were pierced with bayonet ends, is not sufficient to establish the guilt of the accused. They have also specifically raised the contention that samples of the commodity should have, been sent for the opinion of the Chemical Examiner. This plea, of the respondents, was again brushed aside, by the learned sessions Judge, on the ground that the prohibition officer must be considered to have got sufficient experience of smelling and knowing whether a liquid was arrack, or not, and, inasmuch as he has deposed that the liquid was found to be arrack, by smell, that statement can be accepted as proof of the nature of the liquid that was being transported, by the respondents. The learned Sessions Judge has also stated that no further testing is called for. The learned Sessions Judge in the end, confirmed the conviction of the respondents. The respondents carried the matter further, to the High Court of Andhra Pradesh, in revision. The High Court has accepted the plea of the respondents that, in this case, there has been no proper proof that the commodity that was found to be transported, was' airrack. The High Court is of the view that when the accused have denied the offence of carrying any arrack, the prosecution should have got the commodity examined, by a Chemical Examiner, and, inasmuch as that procedure has not been adopted, the: High Court ultimately, set aside the conviction of the respondents. On behalf of the appellant State, Mr. Ram Reddy urged that, In this case, inasmuch as the prosecution has let in the evidence of the Prohibition Inspector and the petty officer, who must be considered to be well aware of arrack the High Court was not justified in interfering with the decisions of the subordinate Courts.. Counsel has also pointed out that the prosecution witnesses have spoken to the fact that the contents of the tins were examined, by being pierced with bayonet ends and it is, after such examination. the Prohibition Sub-Inspector satisfied himself that the tins contained arrack.

There is no appearance, on behalf of the respondents, before, us, in this Court.

This will be a convenient stage to refer to the relevant provisIons of the Act. Section 3 defines certain expressions. `Intoxicating drug' is defined, under s. 3 (8), and s. 3 (9) defines 'liquor', under which the commodity, in question, is stated to fall. 'Liquor' includes toddy, spirits of wine, methylated spirits, spirits, wine, beer and all liquid consisting of or containing alcohol. Under s. 4(1)(a), whoever imports, exports, transports or possesses. liquor or any intoxicating drug, shall be punished imprison- ment which may extend to six months or with fine which may extend to one thousand rupees, or with both. In this case, according to the prosecution, the respondents had transported liquor.

The expression 'liquor', as mentioned earlier, is defined under :s. 3(9). The prosecution will therefore have to establish that the .commodity in question comes under one or other of the various items referred to in the definition of 'liquor'. The question is whether the prosecution has so established, in this case.

In our opinion, in the circumstances of this case, the High Court was perfectly justified in holding that the prosecution has not established that the respondents are guilty of an offence, under s. 4 (1)(a) of the Act. It is needless to state that, in this case, unless the prosecution proves the contravention of the provisions -of the Act, in question, it cannot succeed in establishing the guilt of the accused. For that purpose, the prosecution will have to establish two things: (i) that the article seized from the accused is 'liquor', under s. 3 (9) of the Act; and (ii) that the accused 'transported' the same.

Except for a general statement, contained in the evidence of the witnesses, particularly P.Ws. 1 and 4, that there was a strong smell of alcohol, emanating from the tins, which were pierced ,open, there is no other satisfactory evidence to establish that the article is one coming within the definition of the expression 'liquor'. Merely trusting to the smelling sense of the Prohibition Officers, and basing a conviction, on an opinion expressed by those officers, under the circumstances, cannot justify the conviction of the respondents. In our opinion, better proof, by a technical person, who has considered the matter from a scientific point of view, is not only desirable, but even necessary, to establish that the article seized is one coming within the definition of 'liquor'.

Mr. Ram Reddy, learned counsel for the State, no doubt pointed out that the accused have not challenged effectively the answers given by the prosecution witnesses that the commodity is arrack. In our opinion, the circumstance, pointed, out by the learned counsel, will not absolve the prosecution from establishing the ingredients of the offence, for justifying the conviction of the respondents. Even otherwise, it will have to be noted that all of them have, categorically, denied the offence and have also stated in general terms, that no arrack was seized from them. Before we close the discussion, it is necessary to refer to a recent decision of this Court in Baidyanath Mishra v. The State of Orissa(l). In that case, the question was as to whether the appellants, therein, were in possession of opium, so as to make them liable for an offence. The Opium Act of 1878, defines the expression 'opium'. The appellants contended that the article (1) Crl. Ap. No. 270/1964 decided on 17-4-1967.

seized from them was not opium, as defined in that Act, and pointed out that the only evidence, relied on by the prosecution, to establish that the article recovered from them was opium, was the evidence of the Prohibition staff, and that the article has not been subjected to any chemical analysis. This Court rejected that contention, in the particular circumstances of the case, and stated :

> "It is true that opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and avery strong and characteristic scent. It is possible for people to identify opium without having to subject the product to a chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be necessary. .... Two other witnesses who were cultivators and who knew what they were talking about said that it was opium. If the appellants, who themselves were licensed vendors of opium' had the slightest doubt about the correctness of these statements they could have challenged them either by cross- examination or by suggesting to the co urt that the substance be analysed to determine whether it was opium or not."

These observations will clearly show as to why this Court in that cases has expressed the view that there is no infirmity in the prosecution case, simply because there has no chemical analysis made, of the commodity, which, according to the prosecution, was opium. The facts in the instant case before us, are entirely different, and the observations, extracted above, do not apply. In the result, the order of the High Court is confirmed, and this appeal, dismissed.

Y.P. Appeal dismissed.