

# Ashok vs State Of U.P. on 5 January, 2021

**Author: Umesh Kumar**

**Bench: Umesh Kumar**

HIGH COURT OF JUDICATURE AT ALLAHABAD

Reserved on : 03.11.2020

Delivered on : 05.01.2021

Court No. - 65

Case :- CRIMINAL APPEAL No. - 5815 of 2019

Appellant :- Ashok

Respondent :- State of U.P.

Counsel for Appellant :- Kiran Kumar Arora, Mukesh Joshi

Counsel for Respondent :- G.A.

Hon'ble Umesh Kumar, J.

This appeal has been preferred against the judgment and order dated 02.09.2019 passed by Additional Sessions Judge, Court No.3, Moradabad in S.T. No. 112 of 2010 ( State Vs. Ashok ), by which the appellant has been convicted and sentenced to undergo ten years R.I. under Section 272 IPC with a fine of Rs. 25,000/- and under Sections 60/62 of U.P. Excise Act to undergo two years R.I. with a fine of Rs. 5,000/- with default stipulations.

The prosecution case, in brief, is that one Surendra Singh Pachori- S.I. posted at Police Station, Civil Lines, Moradabad during checking, on the information given by police informer, raided the place where on a furnace, one tin and a patili (pot) were seen and there country made liquor ( kacchi ) was being prepared; that two persons using force were arrested; that on interrogation, they disclosed

their names as Pawan @ Sonu and Ashok (the appellant before this Court); that a recovery memo(Ex.Ka.1) was prepared in which two plastic jarikain containing 8 litres kacchi liquor, one furnace, one pipa and other apparatus for manufacturing country made liquor (kacchi Sharab) were shown; during investigation, I.O. prepared spot map (Ex.ka2), chick FIR (Ex.Ka.5), G.D. entry (Ex.Ka.6) and send material for test report; that after completing investigation, the I.O. submitted charge sheet (Ex.Ka.4); that charges were framed against the appellants under Sections 272 IPC and 60/62 of Excise Act which was read over to the accused who denied the charges and claimed to be tried. The prosecution examined, S.I. Surendra Pachori as P.W.1, constable Dal Singh as P.W.2 and retired Inspector Veerpal Singh as P.W.3. The appellant-accused in his statement under Sections 313 Cr. P. C. denied the incident and stated about false implication.

By the evidences adduced by the prosecution, P.W.1 Surendra Singh Pachori has proved the fact that on 20.2.2010 at 8.45 a.m., he recovered the illicit "kacchi sharab' about 8 litres and appliances, he has proved fard Ex.Ka.1, destroyed the "Lahan' at spot and obtained sample "namuna sharab'.

P.W.2 Dal Singh has also supported the prosecution version and has proved Jarican Ex..1 and 2, patili Ex.3, container Ex.4, plastic pipe Ex.5, bottle (plastic) Ex.6 and a bag of cement Ex.7. This witness has proved fard Ex.Ka.1.

P.W.3 Veerpal Singh is the Investigating Officer of the case. He has proved Ex.Ka.2, map Ex.Ka.3, letter to FSL, Agra and Charge sheet Ex.Ka.4. This witness has also proved the chick FIR Ex.Ka.5, Ex.Ka.6 G.D entry as secondary evidences.

Learned Trial Judge after taking into the prosecution witnesses, has convicted and sentenced the appellant as mentioned above. Aggrieved, the instant appeal.

I have heard learned Counsel for the appellants, learned A.G.A. and perused the impugned judgment carefully.

Submission of learned Counsel for the appellants is that the findings of learned Trial Judge are perverse and against the weight of evidence available on record; that the punishment is too severe; that learned Trial Judge has no appreciated the discrepancies in the statements of witnesses; that there is no independent witnesses except police personnel; that no offence under section 272 IPC at all is made out against the appellants; that the learned Trial Judge has no properly assessed the FSL report which speaks about mixture of 5.4 percent of alcohol; that this report is vague which only speaks of presence of urea, Ammonium chloride (nausadar) and thus, it cannot be said to be report in the eye of law bringing the appellant guilty for offence punishable under Section 272 IPC.

Learned Counsel for the appellant further submits that in order to establish that an offence under Section 272 IPC has been committed, the prosecution has to prove that the article involved was food or drink meant to be consumed by live persons, that the accused altered it, that such adulteration rendered it noxious as food or drink and that the accused at the time of such adulteration intended to sell such article as food or drink, or knew it to be likely that such article would be sold as food or drink; that the offence is complete only on introduction of making it poisonous or harmful or both,

provided it is meant for the purposes of sale actual or likely.

Before advertizing to the arguments of learned Counsel for the parties, it will be in the fitness of things to quote herein below the provisions of Section 272 IPC. It is related to Chapter XIV ( of offences Affecting the Public Health Safety, Convenience, Decency and Morals) which reads as under;

Adulteration of Food or drink intended for sale- Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or, with both.

Amendment:( U.P. Act No. 47 of 1975) " shall be punished with imprisonment for life and shall also be likely to fine, provided that the Court may, for adequate reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."

In support of his submissions, learned Counsel for the appellant has placed reliance on the decision in Ramautar Vs. State of U.P. (Criminal Appeal No. 1882 of 2010) decided on 30.08.2017.

Learned Counsel has cited relevant portion of the decision rendered by Division Bench, Lucknow Bench of this Court in Writ Petition No. 8254(MB) of 2010 ( M/S Pepsico India Holdings (Pvt) Limited and another Vs. State of U.P. & others) decided on 8.9.2010 wherein validity of the Government Order dated 11.5.2010 issued by the State Government directing the police to register cases or initiate action under Sections 272/273 IPC inter alia on the ground that it has resulted in gross violation of fundamental rights of the employee's and agents of the Company as available under Article 14 and 21 of the Constitution of India. Argument is that on coming into force the PFA Act, it repealed Sections 272 and 273 IPC by necessary implication as it occupied complete field with regard to "adulteration of food stuff" and also on the principal of a special law prevailing over a general law to the extent Sections 272/273 IPC got covered by the PFA Act. In the said PFA Act and Sections 272 IPC, the State of U.P. brought amendments in the year 1975 whereby Section 16 of the PFA Act was amended and the period of imprisonment of 6 years was substituted with " imprisonment for life'. Similar amendments were introduced in Section 272 IPC, where the imprisonment for six months was also substituted imprisonment for life.' and the offences under both the Acts were made cognizable and non-bailable.

Learned Counsel vehemently submitted that it is well settled principle of law that a special statute lays down procedures, the ones laid down under the general statute shall not be followed by referring the decision in Jamiruddin Ansari Vs. CBI (2009)6 SCC 316, wherein the Apex Court has held that the provisions of Maharashtra Control of Organized Crime Act (MCOCA) would have an overriding effect over the provisions of Criminal Procedure. In para 67 of the report, the Apex Court observed as under:-

" We are also inclined to hold that in view of the provisos of Section 25 of MCOCA, the provisions of the said Act would have an overriding effect, over the provisions of Criminal Code and the learned Special Judge would not, therefore, be entitled to invoke the provisions of Section 156(3) Cr .P. C for ordering a special inquiry on a private complaint and taking cognizance thereupon, without traversing the route indicated in Section 23 of MCOCA."

On the other hand, learned AGA has supported the impugned judgment and order passed by learned Trial Judge and tried to justify the conviction of the appellants.

It would be relevant here to note that the Law Commission of India in its Report No. 264 in respect to The Criminal Law (Amendment) Bill, 2017 (Provisions dealing with Food Adulteration) speaks about the framework on food safety which is enshrined in the Food Safety and Standard Act 2006 ( in short Food Act) where the food adulteration is dealt with under the Act by creating an offence relating to "unsafe food" .

The Food Act in Chapter IX deals with offences and penalties which provides for punishments for contravention of the provisions of the Act. While section 48 describes how an offence may be committed in regard to food adulteration, Section 50 to 67 prescribes punishment in case an offence is committed. In particular, Section 59 prescribed punishment for unsafe food. Section 3(1)(zz) defines "unsafe food" as any article of food whose nature, substance or quality is so affected as to render it injurious to health. It provides for graded system of punishment which reads as under:

Section 59- " Any person who, whether by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is unsafe, shall be punishable-

(i) where such failure or contravention does not result in injury, with imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees;

(ii) where such failure or contravention results in a non-grievous injury, with imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees;

(iii) where such failure or contravention results in a grievous injury, with imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees;

(iv) where such failure or contravention results in death, with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and also with fine which shall not be less than ten lakh rupees."

The necessity of highlighting the nexus between the repealed Prevention of Food Adulteration Act, 1954 and Section 272 and 273 IPC is to bring forward the issue that the Food Act ( which repeals the PFA Act) does not provide definitions for the above mentioned terms and instead defines the words " adulterant" and "unsafe food" which do not find any mention in Sections 272 and 273 IPC.

The Apex Court in the matter of Swami Achyutanand Tirth & Ors, while pronouncing its judgment refers to the interplay of Section 59 of the Food Act and Sections 272 & 273 of the IPC. It refers to the judgment passed by the High Court of Judicature at Allahabad in the matter of M/S Pepsico India Holdings (Pvt) Ltd. & another Vs. State of U.P. and others and the Court stated that invoking of Section 272 & 273 of IPC in relation to adulteration of food was considered to be unjustified as the authorities could have taken action only under the Food Act. However, the Apex Court decided not to go into the said question at that stage and de listed the appeals preferred by the State of U.P. in the above mentioned matter ( Criminal Appeals No. 476-478 of 2012) which are pending.

In the case in hand, while going through the impugned judgment, I could not come across any definite finding by learned Trial Judge in respect to the fact that whether recovered item was noxious, harmful and injurious to human consumption within the meaning of Sections 3, sub-section 6, 7, 8, 9, 10 and 11 of The U.P. Excise Act which are quoted herein below;

Section (6) " tari" means fermented or unfermented juice drawn from a coconut, palmyra, date or any other kind of palm tree;

Section (7) "pachwai" means fermented rice, millet other grain, whether mixed with any liquid or not and any liquid obtain therefrom whether diluted on undiluted;

Section (8) " spirit" means any liquor containing alcohol obtained by distillation, whether it is denatured or not;

Section (9) "denatured" means rendered unfit for human consumption in such manner as may be prescribed by the State Government by notification in this behalf. When it proved that any spirit contains any quantity of any substance prescribed by the State Government for the purpose of denaturation of the Court may presume that such spirit is or contains or has been derived from denatured spirit;

Section (10) " beer" includes ale, stout, porter and all other fermented liquor made from malt;

Section (11) " liquor" means intoxicating liquor and includes spirits of wine spirit, wine, tari, pachwai, beer and all liquid consisting of or containing alcohol, also any substance which the State Government may by notification declare to be liquor for the purpose of this Act.

There are certain ingredients which are required for constituting an offence under Section 272 IPC. Similarly Section 273 requires certain ingredients to be fulfilled before the offence of adulteration can be said to be made. The ingredients are " that somebody selling food article or drinks which has been rendered noxious/unfit for consumption, with such knowledge or having reasons to believe

that the same is a noxious food item. To put it differently, Sections 272/273 IPC are only attracted if it is shown that the adulteration is deliberate, intentional or with knowledge.

The Food Act, repealed the PFA Act and occupied the entire field in respect of adulteration of food and drinks for sale. The Food Act, provisions would operate and provisions of Section 272 & 273 IPC are not attracted as there is nothing on record to show that the food /drink material, seized was meant for sale.

Thus, one thing is clear that nothing in the Penal Code shall affect any provisions of any Special Act and when for any act or omission in a particular subject, a special set of rules have been framed, in that situation, the provisions of the IPC have to be ignored or overlooked.

On a careful scrutiny of the impugned judgment and materials available on record, I am of the opinion that the prosecution in this case has failed to prove its case beyond all reasonable doubt. Two basic and important things are lacking. Firstly, there is no evidence on record to prove that the recovered item was meant for sale. Secondly, that the recovered item comes within the category obnoxious food/drink harmful for human consumption, so as to hold the appellant guilty of the offences under Section 272 IPC. At the most, offence, if any can be attributed to the appellant is under Section 60(2) of U. P. Excise Act only.

In view of above discussions, I am of the opinion that conviction and sentence of the appellant under Sections 272 IPC is not sustainable and is liable to be set aside. However, in so far as conviction and sentence imposed on the appellant by learned Trial Judge under Excise Act is modified to the period already undergone by the appellant, as the appellant in this case is languishing in jail since 02.09.2019. The fine of Rs. 5000/- so imposed by learned Trial Judge shall be paid by the appellant.

Accordingly, this appeal is partly allowed to the above extent and the impugned judgment and order is modified as indicated above.

Office to transmit the Lower Court Record immediately for onward compliance.

Order Date :- 05-01-2021 Shahid