

A

SRI CHAND BATRA

v.

STATE OF U.P.

December 19, 1973

[M. H. BEG AND Y. V. CHANDRACHUD, JJ.]

B

U.P. Excise Act—s. 60(a)—Whether smelling test enough to justify conclusion that the liquid was illicit liquor—Whether opinion of the Inspector opinion evidence under s. 45 of the Evidence Act.

C

The appellant was found preparing illicit liquor when the raiding excise party searched the room in which he was present. The appellant pleaded that he had no concern with the bungalow searched and that he was not present when the search was taken and that he was falsely implicated in the case. All the materials found in the room were seized. The Excise Inspector had tested the contents of the drums with the aid of litmus paper, hydrometer, and thermometer and did not confine himself to smelling the contents of the drums. The appellant was convicted by the trial court under s. 60(a), U.P. Excise Act, 1910 for preparing illicit liquor and was sentenced to imprisonment and fine. His conviction and sentence were confirmed both by the Sessions Judge and the High Court.

D

The questions raised in this Court were (i) whether the smelling test employed by the Excise Inspector together with other circumstances were enough to justify the conclusion that the liquid recovered was illicit liquor of O.P. strength and (ii) whether the Excise Inspector could be considered an expert whose opinion about the nature of the liquor found was opinion evidence under s. 45 of the Evidence Act.

Dismissing the appeal,

E

HELD: (i) It is not desirable to lay down an inflexible rule on questions of fact even though their determination requires the adoption of scientific methods and tests. It is really for the court of fact to decide whether, upon a consideration of the totality of the facts in a case, it has been satisfactorily established that the objects recovered from the possession of the accused included liquor of prohibited strength. Hydrometer test would be enough if the liquid was known to contain alcohol because it would help to determine the strength of alcoholic contents. [825 D]

F

In the instant case the false defence taken, that the appellant was not present at the house in question when it was searched, could indicate that he wanted to keep his distance from the recoveries made as he was aware of their incriminating nature. Secondly, the appellant who was an employee in a liquor shop, could not be so ignorant about the nature of the liquid recovered as not to be able to raise the question before the trial court that the liquid under consideration was not "liquor" as defined in the Act. There was no reason why the accused, who could be presumed to have enough knowledge about the composition and strength of the prohibited liquor, could not raise this question in the trial court so that the prosecution might cure whatever weakness there might be in the evidence on that point. The Excise Inspector was cross-examined at considerable length but the whole of it was directed at showing that the recoveries were not made from the possession of the appellant. No question was put to him in cross-examination to suggest that the appellant questioned the composition or strength of the liquid recovered as alcohol of prohibited strength or the competence of the Excise Inspector to give his conclusion on the strength of tests adopted by him. The appellant should not be allowed to raise it at a stage when it may be difficult or impossible to adopt a conclusive test. The objects recovered from the possession of the appellant almost proclaim the nature of his activity and of the liquid which could be in his possession.

II

(ii) The competence of the Excise Inspector to test the composition and strength of the liquid was not questioned at all. Nor was his competence questioned to give his conclusion on the strength of the tests adopted by him. No defence evidence was led to indicate that the liquid could be anything else. [826A]

In the instant case, the question of admissibility of the opinion of the Excise Inspector was, however, not raised before the Sessions Judge. The Excise Inspector had deposed that he had put in 21 years' service as Excise Inspector and had tested lakhs of samples of liquor and illicit liquor. On the facts of this case this particular Excise Inspector could be treated as an expert within the meaning of s. 45 of the Evidence Act. The evidence was sufficient to prove the prosecution case beyond reasonable doubt. [826 C]

State of Andhra Pradesh v. Madiga Boosenna & Ors., [1967] 3 S.C.R. 871, distinguished.

State v. Madhukar Gopinath Lalze, I.L.R. [1965] Bombay 257, and *Ram Jus v. State*, [1970] A.L.J. 1343, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 138 of 1970.

From the judgment and order dated the 4th May 1970 of the Allahabad High Court at Allahabad in Criminal Revision No. 1649 of 1968.

K. L. Arora and *M. M. Kshatriya*, for the appellant.

O. P. Rana, for the respondent.

The Judgment of the Court was delivered by

BEG, J.—This appeal comes up before us by a certificate of fitness of the case for appeal to this Court granted by the Allahabad High Court under Article 134(1)(c) of the Constitution.

The appellant was convicted under Section 60(a) of the U.P. Excise Act and sentenced to six months rigorous imprisonment and a fine of Rs. 1000/-, and, in default of payment of the fine, to undergo imprisonment for a further period of two months. His conviction and sentence were confirmed by the Sessions' Judge as well as by the High Court of Allahabad.

On 27-10-1967, at about 6.45 p.m., he was found by the raiding Excise staff in a room of a bungalow in Meerut apparently preparing something with the aid of materials found there which were seized. These were said to be :

- "1. Five drums, each containing about 20 litres liquor of O.P. strength, the sample whereof was taken in five bottles from each tin.
2. Three empty drums of five gallons capacity.
3. Thirty empty bottles bearing labels.
4. Labels. 120 in number, bearing the words "Khody's Herecules....".
5. Different types of capsules, 142 in number".

His plea was that he had no concern with the bungalow in question and that he was not present at the time when its search was taken. He said that the Excise Inspector came to the liquor shop of Gyan Chand Chander Mohan, situated in Sadar Bazar, Meerut, where he was working as a salesman. According to him, the Excise Inspector wanted to check the stock of spirit and demanded the register from him. As the register was locked in a drawer the Excise Inspector is alleged to

- A have abused the appellant and implicated him falsely for alleged possession of the objects mentioned above.

B It may be mentioned here that the search of bungalow No. 243, Circular Road, Meerut Cantonment, from where the recovery was made, was taken after the issue of a regular search warrant (Ex. Ka. 1) under Section 52 of the U.P. Excise Act, 1910, by a First Class Magistrate on 26-10-1967. The very detailed recovery Memo (Exhibit Ka. 2) dated 27-10-1967 was signed by as many as six witnesses, in addition to having been signed by the officer who conducted the search and by the appellant himself. In this Memo, in the column for remarks, the result of the test report of the liquor is given as follows :

C "Test report of the liquor.

The contents of all the five (paper torn) of dirty white colour like, (paper torn) characteristics smell of the (paper torn) Hydrometer test is as under (paper torn).

Drum No. 1-77 F x 13.2-50.9 O.P.

Drum No. 2-77 F x 13.4-50.7 O.P.

D Drum No. 3-76 F x 13.8-50.6 O.P.

Drum No. 4-76 F x 14.2-50.2 O.P.

Drum No. 5-77 F x 13.6-50.5 O.P.

Hence the contents of each drum are liquor of O.P. strength".

- E Two questions have been raised in this case for our consideration : Firstly, whether the smelling test employed by the Excise Inspector together with other circumstances were enough to justify the conclusion that the liquid recovered was illicit liquor of "O.P" strength ? And, secondly, whether the Excise Inspector could be considered an expert whose opinion about the nature of the liquid found was opinion evidence admissible under Section 45 of the Evidence Act ?

F It will be seen from the statement of the appellant under Section 342 Criminal Procedure Code that he had professed ignorance about the nature of the liquid recovered from the room of the house in which he was found. The false defence taken, that he was not present at the house in question when it was searched, could indicate that he wanted to keep his distance from the recoveries made as he was aware of their incriminating nature. Moreover, the appellant, who was an employee in a liquor shop, could not be so ignorant about the nature of the liquid recovered as not to be able to raise the question before the Trial Court that the liquid under consideration was not "liquor" as defined by the Act. In the Trial Court, he examined a number of witnesses to substantiate his plea that he was not present at the house from which the recovery was made but was taken from the shop in Sadar Bazar. And, that was the only question of fact which seems to have been raised and considered in the Trial Court at considerable length. Before the Sessions Judge also the main question raised was whether the appellant was arrested from the shop in Sadar Bazar or from the Kothi at Cir-

cular Road, Meerut Cantt. The learned Counsel for the appellant had, however, at the end of his arguments also contended, before the Sessions Judge, that the liquid recovered had not been proved to be illicit liquor even if it was established that the recovery was from the possession of the appellant. He had relied on *State of Andhra Pradesh v. Madiga Boosenna & Ors.*⁽¹⁾

The learned Sessions Judge had distinguished *Boosenna's* case (supra) on the ground that the Excise Inspector in the case before us, who had the required technical knowledge and training behind him, had tested the contents of the drums with the aid of litmus paper, hydrometer, and thermometer and not confined himself to smelling the contents of the drums. The question of the admissibility of the opinion of the Excise Inspector was, however, not raised before the Sessions Judge.

It appears that both the questions formulated above were raised before the High Court when the appellant's revision application came up before it. The High Court had also distinguished *Boosenna's* case (supra) on the ground that there were sufficient number of surrounding circumstances to buttress the opinion evidence of the Excise Inspector in the case before us. It pointed out that this was not so in *Boosenna's* case (supra). The High Court had also held that it appeared, from the Excise Manuals and various rules framed by the U.P. Government which had been placed before it, that the Excise Inspectors have to undergo rigorous training in all branches of knowledge involved in the performance of their duties including knowledge of the process of distillation and that the Excise Inspector C. D. Misra, P.W. 1, was a senior man in charge of raids and detection of important cases so that his opinion evidence was admissible, presumably as "expert" evidence, and could be relied upon. In certifying the case under Article 134(1)(c) of the Constitution, the High Court had observed that it was desirable that this Court may decide the question whether, despite the corroborating facts and circumstances which supported the smelling test employed by the Excise Inspector in the case before us, the test to which liquor was to be subjected in such cases was not to be more scientific and accurate than the one actually employed by the Excise Inspector.

Learned Counsel for the appellant had cited *State v. Madhukar Gopinath Lalge*⁽²⁾ where it was held in a prosecution under Bombay Prohibition Act, that, although, the circumstances in which an accused was discovered carrying liquid in rubber tubes may raise grave suspicion against him, yet, the Court would not be content with anything less than a chemical or Ido-form test to determine the composition of the liquid. It was held that the Sykes' or the Hydrometer test could not help in determining whether the liquid under consideration there really contained alcohol or not. It, however, also held that, once it is known that the liquid contained alcohol, the percentage of alcohol in it could be found out by employing the hydrometer test. In other words, according to this decision, the Hydrometer test would be enough if the liquid was known to contain alcohol because it would help to determine the strength of alcoholic contents.

(1) [1967] 3 S.C.R. 871.

(2) I.L.R. [1965] Bombay 257..

A Another case cited was *Ram Jus v. State*⁽¹⁾, where a Division Bench of the Allahabad High Court had held that evidence based on chemical analysis was essential in order to establish that a substance alleged to be Ganja, recovered from an accused person, was really Ganja. In that case, reliance was placed upon the judgment of this Court in *Boosenna's* case (supra) from which the following passage was cited :

B "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 estab-
lish that the article is one coming within the definition of the
expression 'liquor'. Merely trusting to the smelling sense of
C 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 consid-
ered 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'."

D We think that it is not desirable to lay down an inflexible rule on
questions of fact even though their determination requires the adoption
of scientific methods and tests. It is really for the Court of fact to
decide whether, upon a consideration of the totality of the facts in
a case, it has been satisfactorily established that the objects recovered
from the possession of the accused included liquor of prohibited
strength. We see no reason why an accused person in the position of
E the appellant, who could be presumed to have enough knowledge about
the composition and strength of the prohibited liquor could not raise
this question in the Trial Court so that the prosecution may cure
whatever weakness there might be in the evidence on that point. We
do not think that he should be allowed to raise it at a stage when it
may be difficult or impossible to adopt a conclusive test.

F Another question before us is whether the Excise Inspector, whose
evidence was under consideration, had sufficient knowledge to be deemed
to be an expert within the meaning of Section 45 of the Evidence
Act so that the tests adopted by him, together with all the attendant
circumstances, could establish beyond doubt that the appellant was in
possession of illicit liquor. We think that these are also essentially
G questions of fact. If there is sufficient evidence led by the prosecution
to establish its case it becomes the duty of the defence to rebut that
evidence. In the case before us, the appellant's Counsel cross-
examined Shri C. D. Misra, P.W. 1, Excise Inspector, at considerable
length, but the whole of this cross-examination was directed at showing
that the recoveries were not made from the possession of the appellant.
H No question was put to him in cross-examination to suggest that the
appellant questioned the composition or strength of the liquid recover-

ed as alcohol of prohibited strength or the competence of the Excise Inspector to give his conclusion on the strength of tests adopted by him. Again, no defence evidence was led to indicate that the liquid could be anything else. These considerations would be sufficient to dispose off the points raised on behalf of the appellant in the case before us. We may, however, observe that we agree with the High Court that the proposition contained in *Boosenna's* case (*supra*) must be confined to its own facts.

We find that the Excise Inspector who had deposed, at the very outset of his evidence, that he had put in 21 years service as Excise Inspector and had tested lacs of samples of liquor and illicit liquor. As already pointed out, the competence of C. D. Misra to test the composition and strength of the liquid under consideration was not questioned at all. We, therefore, think that this particular Excise Inspector could be treated as an expert within the meaning of Section 45 of the Evidence Act. The Excise Inspector had, in addition to employing the smelling test, used all the other tests he could reasonably adopt. If his competence to give his opinion or the sufficiency of the tests adopted by him had been questioned in the Trial Court, the prosecution would have been in a position to lead more evidence on these questions. We also find that the objects recovered from the possession of the appellant almost proclaim the nature of his activity and of the liquid which could be in his possession. On the facts and circumstances of this case, neither *Boosenna's* case nor any other case would, we think, help the appellant. Consequently, we dismiss this appeal and affirm the conviction and sentence of the appellant. The appellant should surrender to his bail and serve out the sentence.

P.B.R.

Appeal dismissed.