HIGH COURT OF GUJARAT

DASRATLAL MANILAL MODI

Versus

STATE OF GUJARAT

Date of Decision: 18 December 2006

Citation: 2006 LawSuit(Guj) 371

Hon'ble Judges: C K Buch

Case Type: Criminal Appeal

Case No: 681 of 1995

Subject: Criminal

Acts Referred:
Code Of Criminal Procedure, 1973 Sec 360, Sec 361
Essential Commodities Act, 1955 Sec 7
Arms Act, 1959 Sec 25(1B)(a)

Final Decision: Appeal allowed

Advocates: R C Jani, A J Desai

Cases Referred in (+): 4

[1] The present appeal arises out of the judgment and order dated 28th March, 1995 of the learned Additional Sessions Judge and Special Judge, Mehsana passed in Essential Commodity Case No.14 of 1993. The appellant came to be tried for offences punishable under with Section 7 of the Essential Commodities Act, 1955, so also, he was found guilty for violating the provision of Kerosene (Restriction on Use) Order, 1966 by the trial Court and came to be convicted therefor. The learned trial Judge after recording conviction and after hearing the accused on quantum of punishment, sentenced the accused-appellant to undergo Rigorous Imprisonment for 03 (three) months and to pay a fine of Rs.400/-, in default thereof, to undergo further seven days rigorous imprisonment. The accused-appellant was given the liberty to set off the period of sentence which he has undergone as under trial prisoner.

[2] The facts of the case can be stated thus:-

[3] The complainant was discharging his duty as District Civil Supply Officer at Collector Office, Mehsana and as per the order dated 12/2/1992 of the District Collector, the complaint was registered. At that time, some Officers of the Civil Supply Office, so also, the expert persons of Forensic Science Laboratory were campaigning for restricting the unauthorized use of kerosene as fuel in the auto-rickshaw at town Patan on 6/5/1992. During the course of checking, one rickshaw bearing Registration No.GRW 8281, which was driven by the present accused was intercepted and brought to the compound of circuit house. Thereafter, the sample of fuel was taken from the fuel tank of the rickshaw by the Police in the presence of Panch. On preliminary analysis done by the F.S.L. persons, it was found that the kerosene was mixed with the fuel recovered from the tank of the rickshaw. Thereafter, the adequate sample of fuel was taken in a bottle from the tank of the rickshaw in a sealed bottle and signatures of the complainant and Panchwitnesses were also obtained. On detailed analysis, the expert of the F.S.L. found that the sample which was taken from the tank of rickshaw was mixed with kerosene-hydrocarbons. The Police had arrested him. Offence was registered and case was investigated. Ultimately, the Investigating Agency, having found sufficient material to connect the accused-appellant with the crime, filed charge-sheet.

[4] After considering the evidence led by the prosecution, the learned Judge came to a conclusion that the prosecution was successful in establishing charges levelled against the appellant and therefore, convicted the accused-appellant for the said offence by the impugned judgment dated 28th March, 1995 passed in Essential Commodity Case No.14 of 1993. It is this judgment and order that has given rise to this appeal.

[5] Heard learned Advocate, Mr.R.C.Jani for the appellant and learned A.P.P., Mr.A.J.Desai for the respondent-State.

[6] Record and proceedings are before me and I have been taken through the same by both the sides during the course of hearing, mainly the evidence recorded during trial.

[7] Learned Advocate, Mr.Jani has submitted that admission of the accused cannot be said to be satisfactorily proved, because there is confusion even on plain reading of the evidence that who had recorded the alleged confessional statement of the accused or before whom the accused had confessed about the act of adulteration by using kerosene in the petrol while driving the rickshaw on 6/5/1992. It emerges from the documents and deposition of Prosecution Witness No.5, Khodidas Dhanjibhai Pandya, who is examined at Exh.31. This witness has stated that Panchnama of drawing the sample of fuel from the tank of auto-rickshaw was drawn by him. He has called two Panchas. However, the Panchas have not supported the prosecution case. So far as alleged confession is concerned, according to this witness, one Mr.G.A.Kumbhar has

written the statement of the accused. It is not the say of this witness that it was written as per the dictation given either by this witness or by the accused. Of course, he has denied the suggestion that signature of the accused was obtained on a blank paper and he has also denied that any statement of the accused was recorded on that day or at the time when the sample was drawn in presence of Panchas. When Mr.Kumbhar has not been examined and a very important witness has not proved the alleged confession i.e. statement at Exh.33 it looses its evidentiary value and strength as extra judicial confession of the accused. The Court should read Exh.33 in the background of the explanation given by him to the Collector in response to th the show-cause notice. The reply on the contrary indicates that he may be victim of adulteration in the petrol made by the petrol pump owner i.e the company distributor. Meaning thereby he had retracted the earlier statement if made by him. As per the settled legal position retracted statement should be read and considered with great caution in the background of other circumstances of the facts available on record.

[8] The Court is supposed to consider the report of the F.S.L., whereby the expert has opined that the sample received for analysis in a sealed condition was showing presence of kerosene hydrocarbons which are found in kerosene and the liquid taken for analysis from the sealed bottle was petrol mixed with kerosene. Reading of this opinion at Exh.24 gives a clear impression that the fuel sample drawn from the tank of the auto-rickshaw driven by the accused was not a pure petrol but it was mixed with kerosene. The crucial question before the Court was that who was the responsible for the adulteration found and what was the quantum of adulteration. The Laboratory Report (Exh.24) is silent as to the percentage of the kerosene found in the sample analyzed by the laboratory. So, if a single drop of kerosene is added in the petrol such a report is possible. Because the sample was analyzed by using four different methods mentioned in the report of analysis. Accused being de facto owner of the auto-rickshaw and also the driver, evidence should be evaluated accordingly.

[9] It is alternatively argued by learned Advocate, Mr.Jani that at-least the Court should give the benefit to the accused especially in light of decision of this Court in Criminal Appeal No.712 of 1989 decided on 15th November, 2006 in case of Kayyumbhai Yusufbhai Shaikh Vs. State of Gujarat wherein the Court has given the benefit to the accused under Section 360 of the Criminal Procedure Code. This submission is found relevant and logical.

[10] Mr.Jani, learned Advocate has mainly placed reliance on another case of this Court decided in Criminal Appeal No.725 of 1989 on 17th November, 2006 between Rajusinh Udesinh Vs. State of Gujarat wherein, this Court has granted benefit of doubt to the accused relying on one decision of the Bombay High Court in case of Abdul Jabbar s/o. Abdul Sattar Vs. State of Maharashtra, reported in 1995 CRI. L.J. 3446.

But, according to Mr.Desai present appellant cannot get the advantage of the ratio of the decision in case of Abdul Jabbar (Supra), because in that case, the accused was a driver. In the present case, it is in evidence that the accused was driving the auto-rickshaw owned by his son. In reality the driver himself was de facto owner of the auto-rickshaw driven by him. This fact situation if considered then his statement before the person who intercepted the rickshaw of the appellant-convict assumes importance and there is no need to establish the percentage of the kerosene and it is sufficient that the prosecution to show that the accused was found using kerosene in contravention of the provision of Kerosene (Restriction on Use) Order, 1966.

[11] I do not find any patent illegality or perversity in the findings recorded in the judgment because conviction is not based upon confession. Panchnama has been satisfactorily proved by the Officer who has drawn and it has been expressed by the Officer which has been corroborated by the opinion of an expert who has analyzed the sample. There is no substantial change as to sealing procedure of the sample as it was found in a sealed condition by the F.S.L. Therefore, the order of conviction recorded by the learned trial Judge cannot be said to be erroneous.

[12] Alternative argument advanced by learned Counsel, Mr.Jani is acceptable, in view of decision of this Court in case of Kayyumbhai (supra). Of course in that case learned Counsel appearing for the appellant had not pressed the appeal against the order of conviction and had submitted on the point of quantum of punishment after lapse of several years. In the present case also the order of conviction is old about more than 11 years.

[13] Even, today this Court should think to grant benefit under Section 360 read with Section 361 of the Code of Criminal Procedure, 1973, because after laps of about 20 years the appellant-accused should not be asked to go to serve the sentence of three months. It is true that in the Statute minimum sentence is prescribed but there is no bar in granting benefit under Section 360 read with Section 361 of the Code of Criminal Procedure, 1973. In support of his this contention, Mr.Pathan has relied upon the decision of this Court in case of (The) State of Gujarat Vs. Ganpatbhai Premjibhai Joshi, reported in 1998 (2) G.L.H. 787. The paragraph 6 of the said judgment is stated thus:-

> "6. Under the circumstances, even the provision for minimum punishment will not come in the way because benefit of probation has to be given to the offenders under the provisions of all other Statutes providing for penal offences unless they are specifically excluded either in the Statute itself or under the provisions of the said Probation in relation to the offences under Essential Commodities Act,

obviously, the decision taken by the Ld. Spl. Judge cannot be said to be, in any manner, wrong."

[14] According to Mr.Desai, in essential commodities cases, the Court should not take liberal view otherwise the system of civil supply would get disturbed and in number of cases such requests have been turned down by this Court.

[15] The Court should not ignore the status of the accused as rickshaw driver. The rickshaw was purchased in the name of his son. In those days, the Government was very strict in regulating the supply of use of kerosene being essential commodities. When this Court has observed earlier that minimum punishment by itself would not be a bar in giving benefit of probation, this Court is inclined to exercise discretion in favour of the appellant-accused because sentencing the accused and asking him to go in jail after lapse of about 20 years, when the punishment imposed by the trial Court is only three months. The Court is aware that protraction of proceeding by the trial Court or the appeal or hearing of the appeal by itself would not make the accused entitle to have a liberal view in his favour. In the offences of moral turpitude or heinous crime, the approach of the court should be of some deterrence. This is not a case of seizure of kerosene or any other essential commodity in large quantity; nor it is a case where an industrialist is found using kerosene without permission for the purpose other than permitting authorization.

[16] Similar view was taken by the Punjab & Haryana High Court in case of Joginder Singh Vs. the State of Punjab, reported in 1980 CRI. L.J. 1218 wherein it was observed thus:-

"though the sentencing process is an integral part of the trial, this would not in any way affect the issue of the applicability of Section 360 and 361 of the Criminal Procedure Code, 1973 to the sentencing process. Therefore, even though a special act may provide the sentence for offence whether fixing a minimum therefor or otherwise, this would be no reason for saying that these provisions of the Code would be excluded or be inapplicable.

[17] The Rajasthan High Court in case of Jatan Singh Vs. State of Rajasthan reported in 1995 (3) Crimes 773, where Police had recovered 12 bore country made pistol and the accused was convicted under Section 25 (IB) (a) of the Arms Act, also approved grant of such benefit under the provisions of Probation of Offenders Act. Of course, the accused had remained in jail for one and half months. In the said decision the Court while granting the advantage of Probation has observed thus:-

"I have given my thoughtful consideration to the rival contentions. The Arms Act, 1959 does not exclude the application of provisions of Section 360, Cr.P.C. as well

as those of provisions under Probation of Offenders Act, 1959. In Jugta Ram vs. State of Rajasthan it has been held that unless any Act excludes the applicability of Section 360 of Criminal Procedure Code or the provision of Probation of Offenders Act, the mere fact that a minimum sentence has been prescribed for any offence, is not sufficient to refuse beneficiary probation. It was further observed that its application, however, depends on the facts of each case as to whether such benefit should be extended to the accused or not. This is trite law that mere prescribing of minimum sentence for a particular offence does not create any bar for extending the benefit of probation, either under Section 360 of Criminal Procedure Code or under the Probation of Offenders Act in a particular case. A similar view has been taken in Pidar Singh Vs. State of Rajasthan."

[18] In the result, present appeal is partly allowed. While confirming the judgment and order of conviction and sentence of the learned Special Judge, Mehsana passed in Essential Commodity Case No.14 of 1993 on 28/3/1995, the appellant-accused is given the benefit of probation under Section 360 read with Section 361 of the Criminal Procedure Code, 1973. The appellant-accused is directed to execute a bond of good behaviour with one surety of Rs.5,000/- for a period of one year under the scheme of Section 360 read with Section 361 of Criminal Procedure Code, 1973. The appellant-accused is also directed to execute a personal bond of Rs.5,000/- before the trial Court within 30 days from today, failing which the trial Court shall issue non-bailable warrant for arrest of the appellant-accused and he will be liable to serve the sentence imposed upon him by the trial Court. Bail Bond of the accused-appellant stands cancelled.