THE HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

BEFORE SINGLE BENCH: JUSTICE SHRI SHAILENDRA SHUKLA

Case No.	:	**Criminal Revision No.1299/2019**
Parties name	:	**Jaisingh S/o Dheeraj Rajput vs. State of M. P.**
Date of Judgement	:	26/04/19
Bench constituted of	:	Hon'ble Justice Shailendra Shukla
Judgement delivered by	:	Hon'ble Justice Shailendra Shukla
Whether approved for reporting	:	Yes
Name of counsels for the parties	:	Shri Ashish Gupta, learned counsel for the applicant. Shri Yogesh Kumar Gupta, learned Public Prosecutor for the non-applicant – State.
Law laid down	:	Seizure of 22 boxes of liquor, each carrying 48 quarters of Liberty Tango Gin and 2 boxes each containing 48 quarters of Bagpiper Whiskey. (1) Whether it is necessary to examine each and every bottle of the seized liquor or even substantial quantity of seized liquor when the bottles were sealed with labels carrying description of the liquor along with other specifications such as batch number, lot number, serial number etc.- **Held**, no - Examination of only one such bottle of each kind of liquor was adequate for analysis. (2) Observations made in earlier Single Bench judgements of **Sunil Tiwari vs. State of MP, 2009(1) MPWN 60** and **Babulal S/o Premsingh vs. State of MP, 2006 (1) MPLJ 317** considered and differed in view of Full Bench judgement of the Apex Court in **Vijendrajit Ayodhya Prasad Goel vs. State of Bombay, AIR 1953 SC 247.**
Significant paragraph numbers	:	13, 14, 15, 16, 17, 20, 22, 24

O R D E R

(Passed at Indore on this 26th of April, 2019)

1. This order disposes of criminal revision filed by the applicant – Jaisingh S/o Dheeraj Rajput under Sections 397 r/w 401 of Cr.P.C., which has been preferred against the order of First Additional Sessions Judge, Jhabua pronounced on 13.02.2019 in Criminal Appeal No.172/2015, whereby order of conviction and sentence pronounced by the Chief Judicial Magistrate, Jhabua on 29.09.2015 in Criminal Case No.1496/2015 convicting the applicant under Sections 34(1)(a) read with 34(2) of the M. P. Excise Act and sentenced him to undergo 1 year RI with fine of Rs.25,000/- and in default of payment of fine, to suffer additional 3 months SI has been affirmed, thereby dismissing the appeal.

2. The prosecution case in short was that on 21.09.2012, pursuant to receipt of secret information, one Maruti Suzuki Car bearing registration No.MP09 A 1644 was intercepted by the officers of the Excise Department and two persons namely, applicant – Jaisingh and one another co-accused Sonu was found sitting in the car and on searching the car, 207.36 bulk litres of liquor was recovered from the car. The case was registered and after investigation, which comprised analysis of seized liquor and collecting other pieces of evidence, charge-sheet was filed under Sections 34(1)(a) read with 34(2) of the M. P. Excise Act.

3. Learned Trial Court framed charges under Sections 34(1)(a) read with 34(2) of the M. P. Excise Act against the applicant and

two other co-accused persons.

4. The prosecution examined five witnesses in all namely, Suresh (PW-1), Pappu (PW-2) both independent witnesses, R. S. Sikarwar, Excise Sub-Inspector (PW-3), K. C. Roiwar, Excise Sub-Inspector (PW-4), Ishwarlal, Excise Constable (PW-5).

5. Learned Trial Court convicted the applicant – Jaisingh while two other co-accused persons were acquitted. The applicant preferred an appeal against the order of conviction and sentence and the Appellate Court was pleased to dismiss the appeal affirming the conviction and sentence.

6. In the criminal revision, it has been stated that independent witnesses have not supported the case of the prosecution and that the statements of witnesses are self-contradictory. That applicant was a poor agriculturist and first offender and that each and every bottle of liquor seized was not subjected to analysis and therefore, it cannot be stated that liquor seized was 207.36 bulk litres. There were 22 boxes each carrying 48 quarters of Liberty Tango Jin and 2 boxes each containing 48 quarters of Bagpiper Whiskey.

7. The question before this Court is whether the conclusion regarding conviction and quantum of sentence imposed against applicant - Jaisingh is liable to be set aside and the applicant deserves to be acquitted or not.

8. Submissions were made and record of the Trial Court was perused.

9. Learned counsel for the applicant in his submission has not challenged the conclusion arrived at by both the Courts below

regarding interception of the car bearing registration No.MP09 A 1644. He has also not challenged that the applicant -Jaisingh was found sitting in the car. He has further not challenged that some of the boxes recovered from the car were allegedly containing liquor. However, learned counsel for the applicant has made submissions that each and every bottle contained in boxes seized from the car was not subjected to analysis so as to confirm that there was liquor in each and every bottle.

10. In support of his submission, he has cited two judgements of the M. P. High Court in the case of **Sunil Tiwari vs. State of MP** reported in **2009 (1) MPWN 60** and **Babulal S/o Premsingh vs. State of MP** reported in **2006 (1) MPLJ 317,** both being Single Bench judgements. In the case of **Sunil Tiwari (supra)**, it was found that out of 288 quarters of alcohol seized, only 3 were tested. Referring to the Apex Court judgement pronounced in the case of **Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa** reported in **1993 CRLJ 1485,** it was held that each of the bottle was required to be examined as to whether it contained alcohol or not. In this case, reference was also made to the citation of **Babulal (supra).** In the case of **Babulal (supra)**, 129 bulk litres of liquor was allegedly seized from the accused. Out of that, only one bottle of plain liquor and 3-4 bottles of English liquor was put to test. It was held that the quantity which was put to test was very meagre. It was also held that the concerned authorities should have sent the entire seized quantity or sufficient quantity for analysis.

11. Learned counsel for the applicant thus submits that each and

every bottle seized ought to have been subjected to analysis in order to affirm that the quantity of seized liquor in all was 207.36 bulk litres. It has been admitted position that each and every bottle was not subjected to test in the case in hand.

12. R. S. Sikarwar (PW-3) in his statement has deposed that out of 22 boxes of Liberty Tango Gin, 6 boxes were subjected to test and both the boxes containing Bagpiper Whiskey were subjected to test. Analysis report is Exhibit-P/10. He states that it was found that the boxes found to have contained Gin and Whiskey.

13. It would be appropriate to reproduce relevant paragraphs of the Apex Court judgement pronounced in the case of **Gaunter Edwin Kircher (supra),** which has also been reproduced by the Single Bench in the case of **Sunil Tiwari (supra).** The relevant portion is reproduced as under :-

> *Where the Police Sub-Inspector searched the accused, a foreigner and recovered a polythene pouch from his pyjama pocket in which there were tobacco, one cigarette paper packet and two cylindrical pieces of 'Charas". The two pieces of Charas were weighed and found to be 7 gms. and 5 gms. however, only one of the pieces weighing less than 5 gms. was sent for chemical analysis and the other piece weighing 7 gms. was not sent nor part of it by way of sample was sent for analysis, in the absence of positive proof that both the pieces recovered from the accused contained charas only, it could not be said that 12 gms. of Charas was recovered from the accused. Therefore, directions were given by the Court to the concerned authorities to sent the entire quantity seized for chemical analysis so that there may not be any dispute regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should*

> *be sent for chemical examination under a regular panchnama and as per the provisions of law.*

14. Thus, it is seen that in contrast to the facts in **Gaunter Edwin Kircher (supra),** wherein testing of both cylindrical pieces of charas was considered necessary as they were unlabelled and open pieces, in the two cases of **Babulal (supra)** and **Sunil Tiwari (supra),** the seized items were sealed and labelled liquor bottles and there was no reason to apply the analogy the Apex Court judgement in these later two cases.

15. It may further be seen that the judgement of **Gaunter Edwin Kircher (supra)** is a judgement pronounced by the Division Bench. However, in the Full Bench judgement of the Apex Court, in **Vijendrajit Ayodhya Prasad Goel vs. State of Bombay** reported in **AIR 1953 SC 247**, a contention was raised that only one bottle was sent for analysis and therefore, it could not be said that all the bottles recovered from the godown did not rectify spirit. It was argued that such bottle might well have contained phenyl, the manufacture of which the company admittedly was carrying on in that godown. The Apex Court observed that this argument cannot be seriously considered. It was wholly unnecessary to send all the bottles recovered by the police in the presence of *panchas* and which contained the same stuff for purpose of analysis. This argument was thus rejected. This objection was rejected in following terms :-

> *5. Mr. Umrigar next contended that only one bottle out of the articles recovered at the raid was sent for analysis and that it was not proved that all the bottles and the*

> *drums that were recovered from the godown contained rectified spirit. He said these might well have contained phenyle, the. manufacture of which the company admittedly was carrying on in that godown. This argument cannot be seriously considered. It was wholly unnecessary to send all the bottles recovered by the police in the presence of panches and which contained the same stuff for purpose of analysis. This argument is therefore rejected.*

16. The observation of the Full Bench of the Apex Court even if in form of *obiter dictum* is of binding nature. Thus, the Full Bench judgement of the Apex Court, which negates the requirement of testing each and every bottle of seized liquor is binding precedent as against the Division Bench judgement of the Apex Court in the case of **Gaunter Edwin Kircher (supra)**, which pertains to different aspect altogether i.e. two pieces of charas both being open and unlabelled pieces.

17. The Apex Court judgement in the **Vijendrajit Ayodhya Prasad Goel (supra)** has been followed by the Division Bench of Kerala High Court in the case of **Chakkyath Chandran vs State of Kerala** reported in **2008 (2) KLJ 88**. As per the facts of this case, 1.5 bulk litres of liquor was seized from the accused and the sample was taken only from one bottle out of eight bottles and the same was subjected to analysis. It was contended that each and every bottle ought to have subjected to analysis. The case of **Gaunter Edwin Kircher (supra)** was cited in support of the contention.

18. The Kerala High Court, in case of **Chakkyath Chandran (supra)** observed that the Apex Court in case of **Gaunter Edwin**

Kircher (supra) was constrained to direct examination of both the pieces as neither of the pieces contained any identification mark or labelled to indicate that both pieces were of the same article and it was in such circumstances that the Apex Court had directed examination of both the pieces. Kerala High Court, distinguishing the case of **Gaunter Edwin Kircher (supra)** with the case under consideration held that the liquor bottles were labelled and were also sealed and there is nothing to show that the seals were tampered with. It was observed by the Kerala High Court that it is entirely different from the case of two cylindrical pieces in the case of **Gaunter Edwin Kircher (supra)**. It was concluded that it was not required at all to send each and every bottle for analysis.

19. Infact, every manufacturer of Foreign liquor such as Gin and Whiskey etc. are required to adhere to the provisions of the Central Excise Rules, which provides for mentioning of batch number, running serial number and the number of retail packages contained in each wholesale package and distinguishing words or letters denoting the kind and quality of goods.

20. In the case in hand, all the bottles of liquor were found to be sealed and were containing other details batch number, lot number etc. As held in case of **Vijendrajit Ayodhya Prasad Goel (supra),** analysis of even one bottle would have sufficed in such case but in the case in hand, substantial portions of the seized liquor were subjected to test.

21. In view of the above observations, I am inclined to differ from the observations made by the two earlier Single Benches of this

High Court. It is not necessary to refer the matter to the Larger Bench, in view of the fact that the view as expressed is in conformity with the Full Bench judgement of Apex Court in the case of **Vijendrajit Ayodhya Prasad Goel (supra).**

22. Thus, it is held that when sealed bottles of liquor are seized and the bottles carry the description of the ingredients along with batch number, serial number, lot number etc., then it is not necessary to examine ingredients of each and every bottle. It is not even necessary to subject a substantial portion of seized liquor for analysis. Even one bottle of each kind of liquor can be adequate for analysis.

23. An analogy may be taken from Food and Adulteration Rules,1955. Rule 22 (A) of the Rules is reproduced as under :-

> *Where food is sold or stocked for sale or distribution in sealed containers having identical label declaration, the contents of one or more of such containers as may be required to satisfy the quantity prescribed in Rule 22 shall be treated to be part of the sample.*

24. Thus, all the sealed containers are not required to be tested for carrying out analysis as to whether the food sample is adulterated or not. The Apex Court in the case of **State of Punjab vs. Devinder Kumar & others** reported in **AIR 1983 SC 545** considered the above stated provision i.e. Rule 22(A) of the Food and Adulteration Rules, 1955 and held that the quantity required in sampling process need not be more than what is required by the public analyst. If the public analyst considers that the quantity is inadequate for testing, then more quantity may be sampled out. This analogy can safely be

applied in the cases pertaining to Excise Act as well.

25. In the case in hand, learned counsel for the applicant has made further submission that the liquor was not subjected to proper analysis and it was only tested by Excise Officer R. S. Sikarwar (PW-3) who is not an expert.

26. Exhibit-P/10, which is the report of R. S. Sikarwar (PW-3) was perused. It has been stated that seized liquor was subjected to physical test which included smelling of liquor and tasting the same and other examination was litmus paper test. It has been mentioned that on dipping litmus paper in samples of Gin and Whiskey, the same did not change colour. Such tests apart, seized liquor was also subjected to thermometer and hydrometer tests.

27. In **Jagmohan & another vs. State of MP** reported in **2014 (4) MPHT 165,** it has been held that Excise Officer by applying physical test, can give opinion as to whether the seized liquid was liquor or not and chemical examination of liquor is not the only mode to prove it. The same observation has been made in **Kallu Kha vs. State of MP** reported in **1980 JLJ 509** and **Sukhlal vs. State of MP** reported in **1995 MPLJ 266**.

28. R. S. Sikarwar (PW-3) in his capacity as Excise Sub-Inspector was liable to be considered as an expert having adequate experience in distinguishing such liquor.

29. The concurrent findings of the two Courts below regarding seizure of liquor from the accused is not liable to be controverted and the learned counsel for the applicant has also not challenged such findings. Moreover, the Revisional Court is not required to re-

appraise the evidence until and unless there is prima-facie perverse finding or conclusion drawn by the Courts below, which is not so the fact in the case in hand.

30. Thus, the findings of the two Courts below that accused was found to be in possession of 207.36 bulk litres of liquor is maintained and the conviction of applicant under Sections 34(1)(a) read with 34(2) of the M. P. Excise Act is hereby affirmed.

31. Coming to the sentence, the Courts below have awarded minimum mandatory sentence prescribed under the M. P. Excise Act to the accused. Section 34(2) of the M. P. Excise Act provides for minimum one year jail sentence and minimum Rs.25,000/- fine and the Courts below have awarded such minimum sentence only. There is no provision for awarding sub-minimum sentence. This Court cannot travel below the minimum mandatory sentence so prescribed. There being no scope for this Court to interfere with the same, the judgement of conviction and sentence awarded by the Appellate Court is affirmed and the criminal revision stands dismissed. The order of the Trial Court pertaining to seized liquor is affirmed.

32. The revision application is thus disposed of in above terms.

(Shailendra Shukla)
Judge

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