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# PATEL JETHABHAI CHATUR

*v.*

# STATE OF GUJARAT

*October* 20, 1976

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[P. N. BHAGWATI AND S. MURTAZA FAZAL ALI, JJ.]

*Appeal against acquittal of an offence of consuming liquor—Merely because the High Court took the view that a further charge of "possession of liquor" should have been framed, setting aside of the acquittal without finding whether the order of acquittal was erroneous and ordering re-trial is bad—Bombay Prohibition Act,* 1949 *(Bom. XXV) sec.* 66(1)(*b*) *r/w sec.* 378 *Criminal Procedure Code (Act II of* 74), 1973.

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*Charge—Fresh charge on appreciation of evidence can be ordered to be framed by the High Court in exercise of its appellate jurisdiction—Criminal Procedure Code (Act II of* 1974), 1973—*secs.* 386(*a*), 464 (1) *and* 464(2)(*a*).

*Practice—Supreme Court will not entertain a complaint on facts and interfere with a finding of fact by the appellate Court under Article* 136 *of the Constitution of India.*

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*Possession—"Possession" to attract criminal liability must be "conscious possession".*

Section 66(1)(b) of the Bombay Prohibition Act 1949 makes any person liable for punishment on conviction for the offence of "consuming, using, possessing or transporting any intoxicant or hemp." Section 66(2)(b) prescribes a statutory limit of 0.05 percentage of alcohol in the veinous blood taken from the accused. In summary case Nos. 798 and 799 of 1972 before the Judicial Magistrate 1st Class, Kodinar, Gujarat State, the appellant/accused No. 2 along

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with six others was charged with consumption of liquor while accused No. 1, the owner of an agricultural farm, where a drinking party took place was charged with the offence of possessing liquor. In spite of the fact that the percentage of alcohol present in the veinous blood taken from the body of accused No. 2 was more than the statutory limit, in view of breaches of certain statutory rules, in Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959, the appellant/accused No. 2 was acquitted along with accused 3 to 8 in whose cases the percentage was less than the statutory limit. Accused No. 1 was also acquitted for lack of evidence on the charge of possession of liquor.

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In the State appeal, taking the view that in a drinking party there should always be a further charge of possession of liquor, the High Court without examining the correctness of the findings of fact leading to the acquittals, set aside the orders of acquittal in respect of all and ordered retrial. On appeal by special leave, the Court,

HELD : (i) In a State appeal against acquittal, the acquittal should not be set aside unless the High Court on a consideration of the evidence comes to the

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conclusion that the acquittal was wrong. In the instant case, the High Court did not even consider whether the acquittal of the appellant was correct or not and without finding that the acquittal was erroneous proceeded to set aside the acquittal and direct retrial. It was not competent to the High Court to set aside the acquittal without finding that it was erroneous. Setting aside the acquittal order and ordering retrial merely because it took the view that a further charge should have been framed against the appellant and accused No. 3 to 8 was plainly and indubitably wrong. [876 B-D]

(ii) If while hearing an appeal, the High Court, finds that, on the material

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before it, a further charge should be framed, the High Court can legitimately, in the exercise of its jurisdiction set right the error committed by the trial court in not framing a proper charge. [876 G-H]

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(iii) In the exercise of extra-ordinary jurisdiction under Article 136 of the Constitution, the Supreme Court would not ordinarily entertain a complaint on facts. [877 B]

(iv) Possession is distinguishable from custody and it must be conscious possession. Whether the accused is in possession of liquor or not must depend on the facts and circumstance of each case. [877 D]

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 385 of 1976.

(From the Judgment and Order dated 22-12-1975 of the Gujarat High Court in Crl. Appeal No. 180/74)

*N. N. Keswani & Ramesh N. Keswani* for the appellant.

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*K. H. Kazi & M. N. Shroff* for the Respondent.

The Judgment of the Court was delivered by

BHAGWATI, J.—This appeal, by special leave, is directed against an order passed by the High Court of Gujarat setting aside the acquittal of the appellant and directing that he, along with other accused, be retried not only for the offence of consumption of liquor of which he was acquitted but also for the offence of possession of liquor punishable under section 66(1)(b) of the Bombay Prohibition Act, 1949. The question arising for determination is a short one, but in order to appreciate it, it is necessary to state the facts giving rise to the appeal.

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The appellant, original accused No. 2, was at all material times working as District Health Officer in District Amreli in the State of Gujarat. He was, according to the prosecution, found of liquor and whenever he used to go out of Amreli in connection with his duties, he used to participate in drinking parties. On 3rd August, 1972, he visited Kodinar, a town situate in the District of Amreli and late in the evening of that day, he attended a drinking party which was arranged by accused No. 1 in his agricultural farm situate at a place called Ghantwad about 50 Kms. away from Kodinar. Besides accused Nos. 1 and 2, six other persons who were arraigned as accused Nos. 3 to 8 were also present at the drinking party. On receiving information about the drinking party, the District Magistrate and the District Superintendent of Police along with other police officers and panch witnesses raided the agricultural farm where the drinking party was in progress. The raid was carried out at about 00.30 hrs. after midnight and on seeing the police, the appellant and the other accused tried to run away but they were apprehended. The raiding party, also found five glasses and two empty bottles, all smelling of liquor, twelve empty soda water bottles and one full bottle containing liquor and these articles were seized by the raiding party in the presence of the panch witnesses and the panchnama was prepared. The appellant and the other accused were thereafter taken to the Amreli hospital where their blood was taken by the Civil Surgeon for the purpose of carrying out

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A the necessary test for determining the presence of alcohol. The analysis of the blood revealed that, in the case of the appellant, the concentration of alcohol in the blood was more than 0.05 per cent weight in volume while in the case of the other accused, it was less than 0.05 per cent. On these facts, the appellant and the other accused were charge-sheeted before the Judicial Magistrate, Kodinar. The charge against accused No. 1 was that he possessed as well as consumed liquor B in contravention of the provisions of the Act and was, therefore, guilty of offences punishable under section 66(1)(b), while the charge against the other accused, including the appellant, was that they were guilty of consuming liquor in contravention of the provisions of the Act and were hence liable to be punished for the offence under section 66(1)(b) of the Act. The learned Judicial Magistrate accepted the C evidence in regard to the concentration of alcohol in the blood of the accused, but taking the view that breaches of certain rules in the Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959 were committed in taking the blood of the accused, the learned Judicial Magistrate acquitted the accused including the appellant of the offence of consuming liquor under section 66(1)(b). The learned Judicial Magistrate also acquitted accused No. 1 of the offence of pos- D sessing liquor under section 66(1)(b) on the ground that it was not proved by the prosecution beyond reasonable doubt that he was in possession of liquor.

The State preferred two appeals against the order of acquittal passed by the learned Judicial Magistrate. Both the appeals were heard by a Single Judge of the High Court and they were disposed of by a E common judgment. The High Court did not examine whether the order passed by the learned Judicial Magistrate acquitting the appellant and the other accused of the offence of consuming liquor was right or wrong nor did it consider whether the acquittal of accused No. 1 for the offence of possessing liquor was correct or incorrect. But, taking the view that there was no distinction between the case of accused No. 1 on the one hand and that of the appellant and accused F Nos. 3 to 8 on the other so far as the charge of possession of liquor is concerned, the High Court held that, on the material on record, the learned Judicial Magistrate should have framed a charge against the appellant and accused Nos. 3 to 8 not only for the offence of consuming liquor but also for the offence of possession of liquor as in the case of accused No. 1. The High Court observed :

G "Whenever "Drinking Parties" are detected by the police, it is the imperative duty of the prosecution to allege that all the participants of the same are charged with the "possession" of liquor in contravention of the provisions of law contained in Sec. 66(1)(b) of the B'bay Prohibition Act, 1949. It may be emphasised that in such cases, "possession" of liquor does not only necessarily mean actual, physical or conscious H possession of the owner or the occupant of the premises". In such cases of "Drinking Parties", it is always open to a participant to stretch his hand and to take the liquor in question for his own use and consumption. But, in all such cases of

"Drinking Parties", the Court must be satisfied that the attendant circumstances should clearly indicate that the accused persons are the participants in a "Drinking Party". In the case before me, why should the accused persons, during the night hours, having gathered together go to a distant farm house ? Why should they be found with the aforesaid articles ? Why should they create a situation as a result of which a constable had to jump over a wall ? Why should they try to run away when they were apprehended by the responsible officers for Amreli ?

In such circumstances, it is the duty of the prosecution to see that all the participants are charged with the commission of the offence viz. of possessing liquor in contravention of the provisions contained in Sec. 66(1)(b) of the B'bay Prohibition Act, 1949."

The High Court, on this view, set aside the order of acquittal in its entirety without examining its correctness and remanded the case to the learned Judicial Magistrate with a direction to try the appellant and the other accused not only on the charge of consuming liquor but also on the further charge of possession of liquor. Accused Nos. 1 and 3 to 8 did not challenge the correctness of this order made by the High Court, but the appellant impugned it by preferring the present appeal with special leave obtained from this Court.

The impugned Order made by the High Court consists of two parts. One part set aside the order of acquittal and directed retrial of the appellant on the charge of consuming liquor while the other directed that the appellant and accused Nos. 3 to 8 should also be tried on the further charge of possession of liquor. The appellant attacked both parts of the Order and the contention urged by him in support of the appeal was a two-fold one. The first limb of the contention was that the order setting aside the acquittal of the appellant for the offence of consuming liquor and directing retrial of the appellant for that offence was improper, since it was not competent to the High Court in appeal to set aside the order of acquittal and direct retrial, unless it found that the acquittal was wrong. Here in the present case, the High Court did not even consider whether the acquittal of the appellant was correct or not and without finding that the acquittal was erroneous, proceeded to set aside the acquittal and direct retrial. This, according to the appellant, was impermissible for the High Court to do and it was said that the order setting aside the acquittal must, therefore, be reversed and the acquittal restored. The second limb of the contention related to that part of the impugned order which directed that the appellant and accused Nos. 3 to 8 should be retried not only on the charge of consuming liquor but also on the further charge of possession of liquor. The argument of the appellant under this head of contention was that in the appeal, the High Court was confined merely to a consideration of the question whether the acquittal of the appellant for the offence of consuming liquor was right or wrong and it was not competent to the High Court

A to frame a new charge for possession of liquor and direct trial of the appellant and the other accused on such new charge. These were the twin grounds on which the order made by the High Court was challenged on behalf of the appellant.

Now, there can be no doubt that there is great force in the first part of the contention of the appellant. The learned Judicial Magis-
B trate acquitted the appellant of the offence of consuming liquor. The State preferred an appeal against the acquittal and manifestly, in this appeal, the acquittal could not be set aside unless the High Court, on a consideration of the evidence, came to the conclusion that the acquittal was wrong. It was not competent to the High Court to set aside the acquittal without finding that it was erroneous. The High Court, however, did not even care to examine whether the acquittal
C was right or wrong, but merely because it took the view that a further charge should have been framed against the appellant and accused Nos. 3 to 8, it set aside the acquittal and directed retrial of the appellant and the other accused. This was plainly and indubitably wrong and the order setting aside the acquittal must, therefore, be quashed. But from that it does not necessarily follow that the acquittal must be
D restored. The High Court having failed to consider the merits of the acquittal, the matter would have to go back to the High Court for the purpose of deciding whether on the evidence on record, the acquittal was justified or not. The appeal being directed against the correctness of the acquittal, the High Court would have to determine whether on merits, the acquittal should be maintained or reversed. We must, therefore, quash that part of the order of the High Court which set
E aside the acquittal of the appellant for the offence of consuming liquor and remand the case to the High Court for disposing of the appeal against the acquittal of the appellant on merits.

That takes us to the second limb of the contention directed against the order of retrial on the further charge of possession of liquor. It is true that originally when the case was tried before the learned Judicial Magistrate, there was no charge against the appellant and
F accused Nos. 3 to 8 for the offence of consuming liquor and the appeal of the State was also directed only against their acquittal for the offence of consuming liquor. But there can be no doubt that if, while hearing the appeal, the High Court found that, on the material before him, the learned Judicial Magistrate should have framed a further charge against the appellant and accused Nos. 3 to 8 but he failed to do so, the High Court could certainly direct the learned Judicial Magis-
G trate to frame such further charge and try the appellant and accused Nos. 3 to 8 on such further charge. The High Court could legitimately in the exercise of its jurisdiction, set right the error committed by the learned Judicial Magistrate in not framing a proper charge. Here, the High Court, on a consideration of the material which was before the learned Judicial Magistrate, came to the conclusion that this mate-
H rial warranted the framing of a further charge against the appellant and accused Nos. 3 to 8 for possession of liquor and it, therefore, directed that the case should go back to the learned Judicial Magistrate and he should try the appellant and accused Nos. 3 to 8 on

such further charge. The High Court clearly had jurisdiction to make such an order. But then, the complaint made on behalf of the appellant was that the material before the learned Judicial Magistrate did not justify the framing of a charge against the appellant and accused Nos. 3 to 8 for possesison of liquor and hence the order directing their trial on such further charge was not justified. This is, however, a complaint on facts and we do not see any reason why we should, in the exercise of our extra-ordinary jurisdiction under Article 136 of the Constitution, entertain such a complaint. It is true that there are certain observations made by the High Court which are a little too wide but it cannot be gainsaid that even a person who participates in a drinking party can in conceivable cases be guilty of the offence of possession of liquor. Suppose a person is found at a drinking party and he has a glass with him with liquor in it at the time when the raid is carried out, would it not be correct to say that he was at the relevant time in possession of liquor ? The liquor in his glass would be liquor in his possession. But at the same time it would not be correct to say that merely because a participant in a drinking party can stretch his hand and take liquor for his use and consumption, he can be held to be in possession of liquor. The question is not whether a participant in a drinking party can place himself in possession of liquor by stretching his hand and taking it but whether he is actually in possession of it. Possession again must be distinguished from custody and it must be conscious possession. If, for example, a bottle liquor is kept by some one in the car or house of a person without his knowledge, he cannot be said to be in possession of the bottle of liquor. It cannot, therefore, be laid down as an absolute proposition that whoever is present at a drinking party must necessarily be guilty of the offence of possession of liquor and must be charged for such offence. Whether an accused is in possession of liquor or not must depend on the facts and circumstances of each case. Here in the present case, the prosecution will have to establish at the trial by leading satisfactory evidence that the appellant and the other accused were in possession of liquor as else the prosecution on the charge of possession of liquor will fail. The order directing trial of the appellant and the other accused for the offence of possession of liquor must, therefore, be maintained, but we think it would be desirable if this trial is taken up after the disposal of appeal by the High Court in regard to the acquittal of the appellant for the offence of consuming liquor.

We accordingly allow the appeal in part and reverse that part of the order of the High Court which set aside the acquittal of the appellant for the offence of consuming liquor and remand the case to the High Court for disposing of the appeal against the acquittal of the appellant on merits, but so far as the other part of the order directing trial of the appellant and the other accused on the charge of possession of liquor is concerned, we do not see any reason to interfere with the same and we accordingly reject the appeal in so far as it is directed against that part of the order.

S.R. *Appeal partly allowed.*