

The State of Maharashtra Vs. N. Khamkar

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Court : Mumbai

Decided On : Sep-27-1976

Reported in : 1977CriLJ1485

Judge : Gandhi, J.

Appellant : The State of Maharashtra

Respondent : N. Khamkar

Judgement :

Gandhi, J.

1. This is a State appeal against the original accused No. 2 against the order of acquittal dated 7-6-1974 passed by the Judicial Magistrate, F. C., Wai. The prosecution was Under Sections 7(i), 7(ii) and 7(v) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the 'said Act').

2. Original accused No. 2 was prosecuted along with one Sadashiv Vithoba Khamker, who was original accused No. 1, for committing an offence of selling Jilebi which was adulterated and misbranded food as defined Under Sections 2(i) (j) and 2(ix) (d) of the said Act. This being an appeal against the order of acquittal, the facts having been stated in the judgment of the lower Court, I do not propose to repeat the same here but there are certain important dates which are required to be stated. The date of the alleged offence is 19th February 1973, on which date

the Food Inspector obtained Jilebi from the shop of accused No. 2, in whose name in the Municipality the licence for running the shop stands and at the time when the Jilebi was purchased, accused No. 1 was present in the shop. The next date is 21st February 1973. After following the usual procedure which is required under the said Act, on taking proper quantity of Jilebi, dividing it into three groups, giving one sample to the accused and carrying two samples duly sealed and signed by the Panchas, on 21st February 1973, the Food Inspector sent the sample to the Public Analyst. On 29th March 1973 the Public Analyst made the report which is at Ex. 7 on p. 19, After obtaining the report of the Public Analyst, which certified that in the opinion of the Public Analyst, the sample contained an extraneous non-permitted coal tar dye viz., metanil yellow and was adulterated Under Section 2(i)(j) of the said Act. On 26th April 1973, sanction to prosecute was obtained from the Commissioner, Food and Drug Administration by the Food Inspector. Somehow or the other, however, thereafter, for two months and three days nothing was done. On 29th June 1973 the Food Inspector filed a complaint which is Ex. No. 1 at p. 8. On 15th November 1973 the complainant was examined in the Court and after his examination in chief, the charge under the relevant Sections referred to above was framed on 4th December, 1973. After the entire evidence was over and after hearing the arguments of the parties on 7th June 1974, the learned Magistrate, First Class, by delivering his judgment and for the reasons stated therein, convicted accused No. 1 Sadashiv Vithoba Khamkar Under Section 7(i) read with Section 16 of the said Act and sentenced him to suffer simple imprisonment for one day and to pay a fine of Rs. 1000/-in default to suffer rigorous imprisonment for six months. By the same judgment and reasoning mentioned therein, he acquitted accused No. 2.

3. Mr. Solkar appearing for the State in support of his contention of this appeal against the order of acquittal submitted that the learned Magistrate, First Class, has not understood the provisions of the Prevention of Food Adulteration Act as it is clearly disclosed by the reasoning given in his judgment, while acquitting accused No. 2. The only observations made by the learned Magistrate are as under :--

As regards accused No. 2 one finds, that admittedly he was not present at the time when this incident took place. The mere fact that his name appears in the licence required to be taken under Shops and Establishments Act is not by itself sufficient to indicate his complicity in the absence of any overt act to this effect. The learned Police Prosecutor also conceded this position at the time of the arguments.

4. Now Mr. Solkar submitted that the provisions of Section 7 are so clear and the offences under the Act are offences which are absolute offences which do not require mens rea and once it is established that the article of food sold at a shop is adulterated as described or defined under the Act and the Public Analyst in his report, certifies that it is an adulterated article or is mixed with certain colours which are prohibited under the Rules, then whether the accused, who is the owner of the shop is present or not, he would be liable under the provisions of Section 7 read with Section 16 of the Act for the offence. He submitted that the learned Magistrate cannot act on a concession on a point of law from the Police Prosecutor who might have stated one thing or the other. When the law is so clear as Section 7 reads :

No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute any adulterated food.' Section 16 which provides for punishment also refers to : 'If any person, (a) whether by himself or by any other person on his behalf manufactures for sale, or stores, sells or distributes any article of food (i) which is adulterated within the meaning of Sub-clause (m) of Clause (i) of Section 2 or misbranded within the meaning of Clause (ix) of that section or the sale of which is prohibited under any provision of this Act or any rule made thereunder by an order of the Food (Health) Authority' shall be punished with an imprisonment prescribed in that section. I see considerable force in the arguments of Mr. Solkar and I think the reasoning of the learned Magistrate is not founded on the correct understanding of law. The provisions are so clear that it is not necessary that there should be any complicity established by the prosecution.

5. Referring to the statement of accused No. 2 which appears on P. 26 and ends on P. 28, the accused is asked : 'Do you want to say anything by way of defence? In answer the accused has stated : 'The shop is entered in my name for municipal

licence but I was not present in me shop at the time when this incident took place. I am always out for purchases of articles.' Thus it is not the case of the accused that the shop did not belong to him or that the business did not belong to him or that it is given for running to somebody eke or that he has no concern with the shop. On the contrary, he admits that the shop stands in his name, that the licence for running the shop stands in his name and further part of his duty qua the shop was to go out for making purchases of articles. If this was the only thing which I was to consider, I would have come to the conclusion that the order of acquittal cannot be sustained.

6. But, Mr. Rane appearing for the accused brought to my notice two or three important factors which are to be considered by this Court and submitted before me that independently of the reasoning given by the learned Magistrate, if this Court were to look into the records, if it comes to the conclusion that accused No. 2 could not have been convicted under the said Act, this Court should not interfere in converting the order of acquittal into one of conviction. He submitted that though on p. 28 it has been stated that the accused was always out for purchase of articles, on p. 25 in answer to the question put to accused No. 1, he has stated : 'I asked my cook to purchase the food colour as I was busy on the day being a bazar day. The colour appeared to be yellow and it did not occur to me that it was prohibited.' In other words, Mr. Rane submitted that on the record, there is a statement of the accused Under Section 342. No doubt it is not a testimony on oath. It is true that the accused gives explanation in his own defence and sometimes he may tell the truth or falsehood. But the Court is always entitled to consider what is the statement made. Now, though this answer may not be helpful to accused No. 1, it does help accused No. 2. Mr. Rane for the respondent submitted that the colour on that day which was used for Jilebi was purchased by the cook, and, therefore, it might be a slip on the part of the cook to have wrongly purchased the colour and therefore an inference should be drawn that ordinarily if accused No. 2 who was usually making purchases for the shop, would not have purchased the prohibited colour and allowed it to be mixed with the Jilebi which is being sold in the shop.

7. The second argument which Mr. Rane submitted was that it is true that unfortunately on behalf of accused No. 2 there has been no cross-examination of the Food Inspector of any considerable help to the Court. But, assuming for the sake of argument that what has been stated by the Food Inspector is true and his evidence on oath is to be accepted as true, then his evidence on p. 12 to the following effect is worth noting and comparing it with the report of the Public Analyst (Ex. 7) it is in direct conflict. In these circumstances, if these two things are taken into consideration, there will be a flagrant violation of Rule 18 which has been held by this Court to be mandatory. He drew my attention to P. 12 of the evidence of the Food Inspector to the following effects :--

One of the samples was sent to P.A. Poona along with a memorandum and impression of the seal. The duplicate copy of the memorandum along with the impression of the seal was sent to P.A. Poona by registered Post. I produce the copy of the memorandum which is signed by me.

He drew my attention to the memorandum referred to above which appears on page 16 and which states as follows :--

The sample prescribed below is sent herewith for analysis under Clause (b) of Sub-section (1) of Section 10 and/or Clause (c) (ii) of Sub-section (i) of Section 2 of the Prevention of Food Adulteration Act, 1954.....
.....

2. A copy of this memo and specimen impression on the seal used to seal the packet of sample is being sent separately by post/hand.

The word 'post' is struck off. He drew my attention to Ex. 7 the report of the Public Analyst, which is on p. 19 and which is dated 29th March 1973 and he stated that the report refers to this sending of sample and receipt thereof as follows :--

I hereby certify that received on the 21st day of February 1973 from Shri C. M. Malekar, Food Inspector, F.D.A., Satara, a sample of Jilebi for analysis, properly sealed and fastened and that I found the seal intact and unbroken. The seal fixed on the container of the sample tallied with the specimen impression of the seal

separately sent by the Food Inspector and the sample was in a condition fit for analysis.

After reading all this and even reading the Marathi version of the deposition, Mr. Rane submitted that the evidence of the Food Inspector on oath, namely, that he sent the duplicate copy memorandum along with the impression seal by registered post is a definite improvement and an unreliable story, and more so because in his own words he stated that he sent the sample along with the memorandum and impression of seal. He could not have sent the impression of seal. Therefore, in order to show that the provisions of the Act and the Rules were complied with and the memorandum and the impression of seal were sent separately, he has falsely stated that they were sent by registered post. He submitted that the prosecution has produced the memorandum and that the prosecution has produced the report but has not produced any acknowledgement receipt in order to show that the impression of seal was sent separately by registered post. On the contrary, the memorandum clearly shows that the memorandum and impression of seal were sent by hand delivery and not by post. Reading this report, which refers to the date 21st February 1973, it clearly establishes that all these things, namely, the sample, memorandum, the duplicate copy of the memorandum and the impression of seal were sent on one and the same day, viz., on 21st February 1973 and must have been received on one and the same day by hand delivery. Thus, relying upon this Court's judgment which has fully discussed the judgment of the various High Courts and the Judgments of this Court as well as the Supreme Court, in Criminal Revision Application No. 1184 of 1973(Bom), Mr. Rane submitted that on the prosecution evidence itself, this Court should come to the conclusion that the provisions of Rule 18 are not complied with and, therefore, this rule having been held to be mandatory noncompliance must result into the acquittal of the accused.

8. The next argument advanced by Mr. Rane is that on the date when this prosecution was launched and resulted into the acquittal, the provisions of the Food Adulteration Act as they stood, required that Under Section 13(2) a right was created in favour of the accused to enable him to obtain the opinion of the Central Laboratory if he wanted to challenge the Public Analyst's report and under the old provisions this right can be exercised at any time before the trial ends. He further

submitted that this right can be exercised not only by asking or requesting the Court to send the sample which is given to the accused but also the third sample, which is preserved by the authorities for the purposes of proving the case against the accused. He submitted that on a proper reading of the Supreme Court Judgment in Ghisaram's case 1967 Cri LJ 939(SC) and in spite of the fact that there are other decisions of the Supreme Court, that the right given Under Section 13(2) can be said to have come into operation only on the application being made by the accused for sending a sample to the Central Laboratory, if one were to read the judgments, minutely and in a little detail as has been done by my brother Judge S. K. Desai, which judgment I have already referred to in the judgment referred to above as well as read by me, delay by itself in prosecution under the Prevention of Food Adulteration Act is a factor which is always to be taken into consideration considering the right of the accused which is provided for Under Section 13(2) of the said Act ' He submitted that the article of food concerned is a cooked food Jilebi. If the prosecution by itself from 19th February 1973 till 15th November 1973 when the complainant was examined and produced the report of the Public Analyst did not make aware to the accused of the report that the Public Analyst's report is against him and that the prosecution were going to rely upon the same for obtaining conviction against him, this lapse of 9 months could not under any circumstances keep the Jilebi samples either kept by the Food Inspector or given to the accused in such a condition that the right Under Section 13(2) could be exercised by applying to the Court by sending them to the Central Laboratory for their report. He further submitted if one were to take the date of the filing of the, complaint, namely, 29th June 1973, as the date when the accused could have known that the prosecution were going to rely upon service of the complaint, of the Public Analyst Report, the Food Inspector on his own admission has waited two months and three days for which he has not offered any explanation. The sanction was obtained on 26th April 1973 and the complaint was lodged on 29th June 1973. He submitted that as observed in Ghisaram's case 1967 Cri LJ 939(SC), by the Supreme Court, when articles of food either made out of milk preparations or cooked food, if it is the case of the prosecution that there is adulteration, the prosecution must not only be diligent but must be prompt. Because every day's delay deprives the accused of saying that the article was not adulterated by

requesting the Court to exercise the right Under Section 13(2) of the said Act. He submitted that making of an application or not making it, does not help the Court to decide whether the prosecution is right or wrong. It is the intrinsic evidence of delay which has been established by the dates which have been mentioned here in above, if the Court comes to the conclusion that there is a lapse of six or nine months and the cooked food like Jilebi cannot be preserved, more so, when no preservatives were applied, could a right, which has been considered not only by this Court, but by other High Courts too, vested in the accused, be exercised? If the Court comes to the conclusion that that right was not exercised, the Court should give the benefit of doubt, namely, that the delay caused by the prosecution, in sending articles like Jilebi or food prepared from milk like Pedhas, as has been done by the Supreme Court, deprives the accused of saying that the article was not adulterated.

9. I must note here that Mr. Solkar for the prosecution showed a completely detached approach and said that a food article like Jilebi cannot be preserved without any preservatives or with preservatives to be in a condition that it can be sent for analysis after 9 months. Apart from what Mr. Solkar has submitted. I am of the opinion that the Legislature has clearly intended that the prosecution in criminal matters not only must be filed diligently but must be disposed of as early as possible, more so when the prosecutions are under the Prevention of Food Adulteration Act and much more so when the article considered is a cooked food or a food made of milk. In these circumstances merely because the Advocate in the lower Court, not making an application Under Section 13(2) of the said Act, you cannot deprive the accused of his valuable right Under Section 13(2) and cannot uphold the conviction, Here is not a case where the accused was convicted and I am called upon to confirm the conviction. Here is a case where the accused has been acquitted and the State having come in appeal, though the State has rightly pointed out that the approach of the learned Magistrate or the understanding of his of the said Act was wrong, Mr. Bane's submission that going through the records and looking to the article concerned and going through the various decisions of the Supreme Court and of this Court, if an article of food in respect of which the prosecution has been launched against the accused, has been delayed by six or nine months, the benefit for this delay should not be given

to the prosecution, but must go to the accused.

10. I am also of the opinion that in the state of evidence that has been brought on record, the prosecution has not established beyond any reasonable doubt, compliance with all the provisions of the sections as well as the rules under the said Act. I am much more fortified in my opinion because the legislature now having seen the weight of observations made by amending Section 13, has made it compulsory that as soon as the report of the Public Analyst is received, it must be furnished to the accused within 10 days and within 5 days thereafter, the accused should make an application that the sample kept by him or by the authorities may be sent to the Central Laboratory. Thus, the observations by the Supreme Court and by this Court that in matters of food adulteration, if the articles of food are concerned, and they are such that the report of Central Laboratory which is conclusive, cannot be obtained, then for such delay, the benefit of doubt should go to the accused, as has been approved by the amendment of the Act, This was the prosecution under the Act as it then stood when the prosecution was launched. But that makes no difference. In my opinion, the provisions are to be enforced in a manner fair both to the State and to the accused. It is true that the food adulteration may result into a dangerous result and affect several people who eat them. But at the same time it is equally true that in considering the offence under the Food Adulteration Act which offences are made absolute when mens rea is not required to be established, if the provisions of the Act or the Rules are not complied with strictly and which provisions of the Act and the Rules are held mandatory by this Court, the prosecution is not entitled to get a conviction of the accused. As a result, I hold that on the records which are produced before me. I am not satisfied that the rules framed under the Act, mainly Rule 18 has been complied with. Under the circumstances, apart from the reasoning given by the learned Magistrate, on the arguments before me and on going through the evidence and record, I come to the conclusion that accused No. 2 deserves to be acquitted and, therefore, this is not a case where the High Court will interfere in the order of acquittal to convert it into one of conviction.

11. In the result, the State appeal against the order of acquittal of the accused stands dismissed. Bail bond stands cancelled.

