

Prem Das Vs. State

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Court : Allahabad

Decided On : May-15-1961

Reported in : AIR1961All590; 1961CriLJ737

Judge : M.C. Desai, C.J., ;J. Sahai and ;B. Dayal, JJ.

Acts : [Prevention of Food Adulteration Act, 1954](#) - Sections 2, 7, 16 and 23; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 4(1) and 537

Appeal No. : Criminal Revn. Nos. 817, 1581, 1708, 1927 and 1950 of 1960

Appellant : Prem Das

Respondent : State

Advocate for Def. : Assistant Govt. Adv.

Advocate for Pet/Ap. : P.N. Misra, ;D.P. Mittal, ;Swami Dayal, ;V.K. Barman and ;A.B. Saran, Advs.

Disposition : Application dismissed

Judgement :

Desai, C.J.

1. The applicant challenges his conviction under Section 16 of the Prevention of Food Adulteration Act and the sentence imposed thereunder. In the connected

revisions the applicants challenge their convictions under the same provision and the sentences imposed thereunder. It has been found as a matter of fact that the applicant sold a mixture of buffalo milk and cow milk, a sample of which was taken by an Inspector and sent for chemical analysis. The public analyst reported that the sample contained 5.9 per cent milk fats and 7.0 per cent non-fatty solid and that it contained 7.20 per cent added water. He treated the sample as if the two kinds of milk were mixed in equal proportions.

It is on the basis of this report of the public analyst that the sample has been found by the court below to be adulterated and the applicant has been convicted under Section 16 of the Act for infringement of provisions of Section 7, which prohibits sale of adulterated food. The case against the applicant was tried as a summons case and after the complaint made by the Inspector was read over to him he was asked to plead and he pleaded guilty. Previous to the conviction in this case he had been convicted for another offence under the same Act; he had submitted himself to the conviction and the sentence. On account of the previous conviction he has been sentenced under Section 16(1)(ii) as for a second offence.

2. The first question that arises is whether it has been proved that the milk that the applicant sold was adulterated or not. An article of food becomes an adulterated article of food in various ways mentioned in Section 2(i) of the Act. For instance, if its quality or purity falls below the prescribed standard, or if its constituents represent any quantities which are in excess of the prescribed limits of variability, or if any inferior or cheaper substance has been substituted wholly or in part or it so as to affect injuriously its nature, substance or quality it is adulterated. Before one deals with the question whether there is adulteration or not one must decide what is the article that is under consideration.

In this case the article under consideration is a mixture of buffalo milk and cow milk; the applicant admittedly sold it as a mixture of cow milk and buffalo milk; he did not profess to sell pure buffalo milk or pure cow milk. He would be guilty of infringement of Section 7 only if he sold the mixture in an adulterated condition, i.e. if the quality or purity of the mixture fell below the prescribed standard, or if any inferior or cheaper substance had been substituted in it wholly Or in part so as to

affect injuriously its nature, substance or quality. Merely because it is a mixture it does not become an adulterated article. If he sold it as buffalo milk it can be said to be adulterated because it was mixed with cow milk which is inferior to, or cheaper than, buffalo milk. But he sold it as a mixture, and in order to commit the offence of adulteration he must have adulterated the mixture with something inferior or cheaper or injurious.

3. The mixture, as such, would be adulterated if its quality or purity fell below the prescribed standard, or if for it any cheaper substance was substituted or if it was not of the nature, substance or quality demanded by the purchaser and was to his prejudice, or was not of the nature, substance or quality which it purported or was represented to be. If the proportion of buffalo milk and cow milk was 1 : 2 but the applicant represented that it was half and half it could be said to be adulterated because it was not of the nature, substance or quality which it was represented to be.

Neither in this case nor in any of the connected cases has the milk been found to be adulterated on this ground. In this case there is no evidence of the proportion in which buffalo milk and cow milk were mixed together, in some of the connected cases the accused represented that the two kinds of milk were mixed in a certain proportion but it has not been found on analysis that they were not mixed in that proportion. Nor is it the case in any of the Revision applications that the applicant sold the mixture when the customer demanded buffalo milk, or that any injurious article was mixed with it.

All the applicants have been convicted on the ground that the milk did not conform to the prescribed standard. The standards for the two kinds of milk are prescribed in appendix B to the Rules framed by the Central Government in exercise of the powers conferred by Section 23 of the Act. Section 23(1)(b) authorises the Central Government to make rules defining the standard of quality for, and fixing limits of variability permissible in respect of any article of food. Rules A.11.01 etc. state the standards prescribed for milk and milk products.

Rule A.11.01 simply defines 'milk'. Rule A.11.01.01 prescribes standards for cow milk; every sample of cow milk in U. P. must contain not less than 3.5 per cent of

milk fats and not less than 8.5 per cent non-fatty solids. The standards prescribed for buffalo milk in U. P. in R. A.11.01.02 are that it must contain not less than 6 per cent of milk fats and not less than 9 per cent of non-fatty solid. It is to be noticed that the standards prescribed under the rules are only in respect of milk fats and non-fatty solids and not in respect of water.

A sample of milk will be deemed to be adulterated if the milk fats are less than the prescribed minimum or if the non-fatty solids are less than the prescribed minimum; no maximum for water is prescribed at all and whether milk is adulterated within the meaning of Section 2(i)(1) or not does not at all depend on the quantity of water. Rule 44 of the Rules prohibits sale of 'milk which contains any added water'; therefore sale of milk, to which water has been added, is an offence punishable under Section 16(1)(a), regardless of the question of adulteration.

If a person is accused of selling milk with added water in contravention of Rule 44 it will be necessary to prove that water was added to milk that was being sold, and this can be done either by direct evidence of an eye-witness, or by the evidence of an expert, who, on chemical analysis, finds that water has been added. When however a person is prosecuted not for infringement of Rule 44 but for infringement of Section 7, which prohibits sale of adulterated food, the question is whether the article of food is adulterated or not.

Again, it can be proved to be adulterated by showing that water, which is an inferior and cheaper substance than milk, is added to it and the addition is to the prejudice of the purchaser, and this would require direct evidence of a witness who has seen water being added or an expert opinion to the effect that water has been added. Adulteration can also be proved by showing that the quality or purity falls below the prescribed standard, and usually adulteration is sought to be proved in this manner.

In this and other cases milk is sought to be proved to be adulterated not on the ground that water has been added but on the ground that its quality and purity falls below the prescribed standards. In such a case the public analyst has only to consider the standards prescribed in Rules A.11.01 etc. and should not go out of

his way to find the percentage of added water. It is not known that he can find the percentage of added water independently of the quantities of the milk fats and non-fatty solids found present in the milk analysed by him.

Presumably he finds the quantity of water only by deducting the quantities of milk fats and non-fatty solids from the weight of the sample analysed by him. If so, it is quite useless because his finding that the milk fats, or the non-fatty solids, or both are less than the prescribed minimum itself is enough for holding that the milk is adulterated, and it is mere repetition to say that it is adulterated because water has been added to it. Unless he can find the quantity of added water without determining the quantities of the milk fats and the non-fatty solids, he should not state anything about added water in his report.

4. No standard is prescribed for a mixture of cow milk and buffalo milk, but this does not mean that a mixture of the two milks can never be found on chemical analysis to be below the prescribed standards. When the two milks are mixed together, they retain their individual characteristics; what results is a mixture and not a compound having characteristics entirely different from those of either of the two ingredients. When a person sells mixed cow and buffalo milk he in fact sells cow milk and buffalo milk, and if either or both can be found to be below the prescribed standard, he commits the offence of selling an adulterated article of food.

It is not essential to prove which of the two milks that he sells is adulterated; it is sufficient if it is proved that either one or the other is adulterated (or both are adulterated) because a person can always be convicted in the alternative. It is not impossible to prove that either one or the other is adulterated. If the proportion in which the two milks are mixed together is known, one can always determine the minimum quantity of milk fats and the minimum quantity of non-fatty solids that should be present in the mixture, and if the quantity of milk fats or the quantity of non-fatty solids is less, it means that the mixture is below the standard.

For instance, if in a mixture of 100 lbs. the proportion of buffalo milk and cow milk is 4 : 1 it

must have at least 5.5 lbs.

$(80 \times 6$

+

$20 \times 3.5)$

of

100

100

milk fats and 89 lbs.

$(80 \times 9$

+

$20 \times 8.5)$

of non-

100

100

fatty solids and if the mixture has less of either, it is adulterated. It may not be ascertained which of the two milks is adulterated but this is not required at all. If the quantity of the milk fats or of the non-fatty solids is more than the total of what they should be according to the prescribed standard, the mixture may still be adulterated but the adulteration cannot be proved because it may be that the deficiency below the prescribed minimum in one kind of milk is made up by an excess in the other kind of milk.

But, if the quantity of milk fats or non-fatty solids is less than the total of the prescribed minima, the mixture must be adulterated, because if each of the two milks had more than the prescribed minimum the mixture must necessarily have

had more than the aggregate of the prescribed minima. In such a case it is erroneous to say that the mixture cannot be proved to be adulterated because there is no standard prescribed for a mixture.

There can be no standard prescribed for a mixture because there is no need for it; the standard depends upon the proportion in which the two kinds of milk are mixed together, and it is a matter of simple arithmetical calculation to find out what should be the minimum quantities of the milk fats and of the non-fatty solids. When no standard has been fixed the court has to fix a standard, as pointed out in *Marston v. Loney*, 1955 Crim. LR 778, and the Court should fix a standard for the particular mixture.

5. Even if the proportion in which the two milks are mixed is not known, the mixture can in certain circumstances be proved to be below the prescribed standard. If the total quantity of milk fats or of the non-fatty solids is less than the prescribed minimum for cow milk, it is below standard.

The prescribed minima for cow milk are lower than those for buffalo milk. If buffalo milk is added to cow milk; the quantities of the milk fats and of the non-fatty solids must necessarily be more than if equal quantity of cow milk were added instead of buffalo milk.

Thus, by addition of buffalo milk the percentage of the milk fats or of the non-fatty solids increases but can never decrease and if a mixture has Less percentage of the milk fats or non-tatty solids than the prescribed minimum, it is adulterated. In the present case the quantity of the milk fats was more than the minimum prescribed for cow milk, though less than the minimum prescribed for buffalo milk, but the quantity of the non-fatty solids was less than the minimum prescribed for cow milk and either the buffalo milk or the cow milk contained in the mixture of both kinds of milk were adulterated and the applicant was guilty.

Whatever might have been the proportion in which the two kinds oi milk were mixed, the total quantity of the non-fatty solids could not have been less than 8-5 per cent, if neither of them was adulterated. Surely he could not escape conviction by simply mixing an adulterated article of food with another article; any other view

of the case would result in complete circumvention of the beneficial provisions of the Act; one would have only to mix an adulterated article of food with another and then claim that since there is no standard prescribed for a mixture of the two articles of food, the mixture can never be proved to be adulterated on the ground that its quality or purity falls below the prescribed standard.

In *Municipal Board, Ghaziabad v. Jaswant Rao*, Criminal Appeal No. 1940 of 1960, decided by our brothers Uniyal and Ramabhadran, a different view was taken. The facts in that case were that Jaswant Rao sold a mixture of the two kinds of milk, which on analysis was found to contain 5.6 per cent milk fats and 7.5 per cent non-fatty solids and 17 per cent added water. The proportion in which the two kinds of milk were mixed was not known.

Though the quantity of milk fats was more than the prescribed minimum for cow milk, the quantity of non-fatty solids was less than the prescribed minimum for cow milk and the mixture was undoubtedly adulterated because the quality or purity of one milk or the other fell below the prescribed minimum. Our learned brothers, however, held that the mixture was not proved to be below the prescribed standard. They rejected the evidence of the expert about the quantity of added water because he did not state in the report how much natural water he had found.

With great respect to our learned brothers we may point out that water is nothing but the chemical compound H_2O , that there is no chemical difference between natural water to be found in milk and water that may be added to it for adulteration and that consequently no expert can find how much water was, what our learned brothers call, 'natural water', and how much added for adulteration. What he can do is to find the total quantity of water, but for the reasons given earlier it would be futile for him to do so.

We, however, fully agree with our learned brothers that an expert in his report should not give his opinion about the quantity of added water; it is for the Court to decide whether water has been added artificially or not. In the instant case also the expert has stated in his report that the sample of milk contained so much added water without stating what was the quantity of water actually found by him in it. It is the function of the court to determine in accordance with the law what is

the maximum quantity of water permissible in unadulterated milk and then decide whether the sample contained more than it or not. In *Bakewell v. Davis*, (1894) 1 QB 296, Charles, J., said at page 303 that the proper course for an analyst to adopt is to write down the result of his analysis. A statement of an analyst that the sample contained 13 per cent. of excess water over and above what was allowed by the Act was adversely criticised in *Newby v. Sims*, (1894) 1 QB 478, Day, J., observing at page 482:

'In the present case all that the analyst states in his certificate is that he finds the excess of water to be 13 per cent. over and above that which is allowed by Act of Parliament. It comes to this, that he takes upon himself to act as the judge of law and fact; whereas those questions are for the magistrates to determine. To enable us to act on the certificate we must know what the analyst finds in fact. The statement as to an excess of 13 per cent. is quite insufficient, for there is no statement above what amount in fact the excess is. The analyst ought to determine as a matter of fact how much water there is in the pint of rum, and, as he has not done so, the certificate is not in such a form as to amount to evidence on which the magistrates could act.'

The analyst's certificate to the effect that the sample of milk contained '5 per cent. of added water' was held to be bad in *Fortune v. Hanson*, (1896) 1 QB 202, Hawkins, J., observing at page 205:

'A certificate must state such facts, as will enable the magistrates themselves to come to the conclusion whether the article of food in question had, or had not, been adulterated To say merely that a sample of milk contained 5 per cent. of added water is only to state the analyst's own opinion that water has been added. The Magistrates have to exercise their own judgment on the question. They may adopt one standard; the analyst another. They ought to be informed by the certificate what was the total percentage of water found in the sample.'

We may also refer to *Bridge v. Howard*, (1897) 1 QB 80 in which the analyst said in his certificate that the sample of milk contained 6 per cent. of added water and that his opinion was based on the fact that it contained so much per cent. of the non-fatty solids as against the prescribed minimum of 8.5 per cent. and it was held

that the certificate was good. The certificate was held to be good because of the statement contained in it that the percentage of the non-fatty solids was less than the prescribed minimum.

The certificate was bad in respect of the statement that the sample contained 6 per cent. of added water but, as explained earlier, the statement being based on the quantity of the non-fatty solids was altogether futile and, therefore, the defect in the statement was material. We have taken pains to discuss this matter at length because we find that usually the public analyst mentions in his report the percentage of added water though his opinion is based only on the quantities of the milk fatg and the non-fatty solids found in the sample and that he mentions not the total quantity of water found by him in the sample but his opinion as to how much of it was natural and how much added for adulteration.

It is time the public analyst clearly understood the scope of his duty and confined himself only to what lay within it. We trust that in future the public analyst will state in his report merely the result of his analysis and leave it to the court to determine what is the prescribed standard for the particular article of food and whether the quality or purity of the sample falls below the prescribed standard, and that if he can determine the quantity of water in the sample without determining the quantity of the solids he will state the quantity of water actually found in the sample, leaving it to the court to determine how much if at all, was added water.

Our learned brothers after rejecting the evidence about the percentage of added water observed, 'In the absence of any standard prescribed by the rules, with respect to the quantity of fat content in the case of mixed milk of cow and buffalo, it is not possible to hold that the article was adulterated' and held that the mixture was not proved to be below the prescribed standard. We respectfully disagree with this observation of our learned brothers; it is possible in the circumstances mentioned above to find that a mixture of the two kinds of milk is below the prescribed standard. Jaswant Rao ought to have been convicted and the decision in the case does not lay down the correct law.

6. We were referred to another case Municipal Board, Kanpur v. Badloo, 1960 All L. J. 318 : (AIR 1960 All 504) decided by our brother Dwivedi. There also the

proportion in which the two kinds of milk were mixed was not known, the public Analyst found that the mixture contained 4.8 per cent of milk fats and 7.4 per cent of non-fatty solids and 15 per cent of added water. The quantity of non-fatty solids was less than the minimum prescribed for cow milk and, therefore, the mixture was undoubtedly adulterated. Our learned brother, however, acquitted the accused.

He also over-emphasized the fact that the rules do not prescribe any standard for mixture. With great respect we point out that no question of standard for a mixture arises when the quantity of milk fats or of non-fatty solids is less than the prescribed minimum for cow milk. In that case the Public Analyst, not knowing the proportion in which the two kinds of milk were mixed, assumed that they were mixed half and half and took the means of the two prescribed minima for the two kinds of solids and applied the means to find whether the prescribed standard was maintained or not; he was certainly in error in doing so.

In what proportion the two milks were mixed was not a matter of assumption at all. Only one presumption is permissible under the rules and it is that contained in rule A.11.01.03 and is to the effect that where milk is sold or offered for sale without any indication as to whether it was derived from cow, buffalo, goat or sheep, the standard prescribed for buffalo milk shall apply. This presumption cannot apply when it is known that the milk sold or offered for sale is a mixture of cow milk and buffalo milk, even if the proportion in which the two kinds of milk are mixed is not known.

The presumption applies only when the source is unknown. It is doubtful if it is intended to apply when milk is derived from two or more sources and in any case absence of indication as to the proportion in which milk derived from one source is mixed with milk derived from another source does not mean absence of indication as to whether it is derived from one source or another. In *Chandrika Prasad v. State*, Criminal Revn. No. 313 of 1960, decided by our brother Nigam on November 15, 1960, a mixture of cow milk and buffalo milk sold by Chandrika Prasad was found to contain 2.6 per cent of milk fats and our learned brother holding that the mixture without being adulterated as such could not possibly contain less milk fats than the minimum prescribed for cow milk, convicted him of

adulteration. His decision supports the view that we take. Our brother Mathur in his referring order in the connected revision No. 1581 of 1960 stated that if a mixture of the two kinds of milk contains less than 3.5 per cent of milk fats or less than 8.5 of non-fatty solids, it is of purity or quality below the prescribed minimum. We respectfully agree with this view,

7. Since in the instant case the percentage of non-fatty solids was less than the prescribed minimum for cow milk, the mixture of cow milk and buffalo milk was adulterated within the meaning of Section 2(i)(1), and the applicant was guilty under Section 16.

8. Since he was convicted for an offence which was a second offence in the sense that it was committed after another offence had been previously committed, he could be punished under Section 16(1)(ii). Section 16(1)(ii) lays down that for a second offence the accused must be punished with imprisonment for a term not less than one year and a fine not less than two thousand rupees, in the absence of special and adequate reasons to the contrary.

Here the Magistrate sentenced the applicant to six months' imprisonment and one thousand rupees fine; he did not impose the minimum punishment because he found some special and adequate reasons to the contrary. The sentence that he imposed is less than the sentence that could have been imposed under Section 16(1)(i) for the first offence. When he did not want to impose a punishment higher than what he could for the first offence, it is not understood why he resorted to Section 16(1)(ii) at all. An offence punishable under Section 16(1)(ii) must be tried as a warrant case because punishment extending up to two years can be imposed, but the applicant was tried according to the summons case procedure, which was illegal.

We are, however, satisfied that no prejudice was caused to him by the Magistrate's adopting summons case procedure instead of warrant case procedure. Sri P. N. Misra could not state what prejudice was caused to him by adoption of the wrong procedure, and the irregularity is curable under Section 537, Cri. P. C. Even otherwise, we could alter his conviction from that under Section 16(1)(ii) to that under Section 16(1)(i) and treat him as a first offender and maintain

the sentence, which is less than the maximum prescribed for first offence.

9. In the connected Case No. 1708 of 1960 the proportion in which cow milk and buffalo milk were mixed is not known, but the quantity of non-fatty solids was less than the minimum prescribed for cow milk and the applicant was rightly convicted. He was sentenced to six months' imprisonment, the trial court taking into consideration the aggravating fact that he had been convicted under the U. P. Pure Food Act on 5-2-1955 for selling adulterated milk.

Though it could not sentence him under Section 16(1)(ii) and did not profess to sentence him under that provision (because the first offence was not under this Act but under another Act), it had to take his antecedents into consideration when imposing the punishment and his conviction for selling adulterated milk was a fact which could legitimately be taken into consideration. It has already taken into consideration his old age and refrained from making the punishment rigorous and there is no scope for any reduction in the sentence.

10. In the connected Case No. 1581 of 1960 the proportion of cow milk and buffalo milk was known from before, it being 1:2. The applicant himself professed to sell a mixture of one part of cow milk and two parts of buffalo milk. The percentage of milk fats in the sample was 1.0 which was far below the minimum prescribed even for cow milk. The percentage of non-fatty solids also was less than the minimum prescribed for cow milk. There is no doubt whatsoever that the mixture was grossly adulterated and the applicant was rightly convicted. Whether he had offered the milk for sale or not was a matter of fact.

The evidence of the Inspector is to the effect that he had exposed it for sale and this evidence was not challenged in cross-examination. As against it there was only the applicant's statement that he had not exposed the milk for sale and that it was meant only for use in tea. It was for the courts of fact to decide whether he had exposed the milk for sale or whether he had kept it for private consumption. Their finding that he had exposed it for sale is not at all improper.

This case was referred to a Bench by our brother D. S. Mathur, who said in the referring order that it was not clear whether the milk sold by the applicant was

buffalo milk or cow milk or a mixture of the two kinds of milk and that if the nature of milk was not known, it could be presumed to be buffalo milk. Actually there was evidence that the applicant professed to sell cow milk and buffalo milk mixed in proportion of 1:2, There is, therefore, no question of resorting to the presumption contained in Rule A. 11.01.03.

11. Coming to Cr. R. No. 1950, the proportion in which cow milk and buffalo milk were mixed was known, it being 1:4. Since the proportion was known there was no difficulty in applying the prescribed standards and the milk was undoubtedly adulterated according to them. The question put to the applicant by the Magistrate was certainly meaningless, but no prejudice has been caused to him. He pleaded not guilty and said that he was not the owner of the milk, and that he had sold it in a sealed drum on behalf of the Co-operative Union. Under Section 16 read with Section 7, not only the master but also the servant who actually does the act of selling or distribution is liable.

Even it it be said that the applicant not being the owner of the milk did not sell it, he undoubtedly distributed it. Ownership is not required for distribution. He could not rely upon the defence mentioned in Section 19(2), because he did not fulfil all the three conditions required for it. There are also provisos which shut out the defence in this case. Finally, the defence is not open to a servant. If it were open to a servant he would always, escape punishment and it was not the intention behind Section 16 read with Section 7 that only the master should be punished. The sentence imposed upon the applicant is six months; we do not consider it so heavy that we must interfere with it in revision.

12. In the last Revision No. 1927 the proportion in which the two kinds of milk was mixed was not proved, but the percentage of non-fatty solids was less than the minimum prescribed even for cow milk and, therefore, the milk was adulterated. The applicant is the master and owner of the milk and he has been sentenced to imprisonment of six months and two hundred rupees fine. We do not consider this-sentence as excessive at all, even though the non-fatty solids, and not the milk fats, were less than the prescribed minimum.

13. In the result, we dismiss this application, The applicant is ordered to surrender himself to undergo the sentence.

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