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Court : Allahabad

Decided On : Sep-11-1975

Reported in : 1976CriLJ741

Judge : Hari Swarup, J.

Appellant : Shabbir Ahmad

Respondent : State

Judgement :
ORDER

Hari Swarup, J.

1. This revision has been filed by the applicant against his conviction under Section 7/16 of the Prevention of Food Adulteration Act and the sentence of six months' rigorous imprisonment and fine of Rs, 1,000.

2. The case of the prosecution in brief was that the applicant on October 28, 1970 at about 9 P.M. had exposed for sale milk which was claimed to be buf- falo milk. The Pood Inspector purchased 660 ml of milk and paid 0.90P. as its price. The required notice ni given and tiie jeceipt of payment was also obtained The milk purchased was divided into three parti and sealed in three bottles after adding iommalin. One of the samples was tanded-over to the vendor. The Food Inspector sent one of the sealed bottles to the PuMic Analyst for chemical test. The ana-Jyaii

showed that the milk was deficient to fat contents by 43%. The Public Analyst accordingly reported that the sample adulterated.

3. The accused pleaded not guilty. He also pleaded that he was not selling nrilk and also led evidence in support of ihis contention. The accused himself also appeared in the witness box as D.W. 3. In cross-examination, he admitted that the sample of milk was taken from him but bis thuntb impression was taken by force.

4. The trial court believed the prosecution version and held that the accused was selling milk and had actually sold milk to the Food Inspector which was found by the Public Analyst to be deficient in fat contents. On this finding, the trial court convicted the accused. The lower appellate court found no reason to differ from the finding of the trial court em questions of fact and maintained the conviction and the sentence awarded by the trial court.

5. learned Counsel for the applicant has raised four contentions-:

1. That the applicant wu denied the pportunity of getting the sample of milk tested by the Director of Central Food Laboratory under Section 13(2) of the Prevention of Food Adulteration Act;

2. That the charge framed in the case was not specific; and

3. That the sentence awarded was too severe and should be reduced to the sentence of imprisonment already undergone.

4. That the benefit of the U.P. First Offenders Probation Act, should have been grwen'to-the accused.

6. The circumstances hi respect of the first contention are as follow.

7. The sample was taken on 28-11-1970. Complaint was filed on 21-7-1971. Summonses were issued and served on the accused ori '23-7-1971 for appearence on 31-7-1971. On 17-10-1971 the accused filed an application before the learned Magistrate which was dated 20th August, 1971. In this application, the accused stated that because no sample was handed over by the Food Inspector to the accused, he apprehended that the Food Inspector must have changed the milk

in the bottle sent to the Public Analyst. On this allegation it was prayed that the third bottle of the ample (Adalat ki sample kl shishi) be ordered to be sent to the Director of Central Food Laboratory, Calcutta for examination. This application was rejected by the learned Magistrate on the ground that the Application had been moved after ten months of the sample being taken by the Food Inspector. The appellate court took the view that no illegality had been committed by the learned Magistrate in not sending the sample for further test as the accused did not deposit the requisite amount of fee for Analysis. The appellate court also considered that the accused by his own laches had permitted the long time to lapse before making the request. In this connection, however, the appellate court did not hold that it would have served no purpose to send the sample for test because it was under the wrong impression that the application was moved on August 20, 1971. The question that now arises for decision in this case is: Does the trial of the accused stand vitiated because his prayer purporting to be under Section 13(2) of the Act, was refused by the trial court?

8. Section 13(2) reads as under:

13 (2) After the institution of a prosecution under this Act, the accused vendor or the complainant may on payment of the prescribed fee, make an application to the Court for sending the part of the sample mentioned in Sub-clause (i) or Sub-clause (itt) of Clause (c) of Sub-section (1) of Section 11 to the Director of the Central Food Laboratory for a certificate and on receipt of the application the Court shall first ascertain that the mark and seal or fastening as provided in Clause (b) of Sub-section (1) of Section II are intact and may then despatch the part of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the sample specifying the result of his analysis.' Relevant portion of Section 11 of the Act is as under:

11. Procedure to be followed by the Pood Inspectors

(1) when a Food Inspector takes a fample of food for analysis, he shall-

(a) give notice in writing then and there of his intention to have it so ana- lysed, to the person from wham It hm taken the sample;

(b) except in special cases provided by rules under this Act separate the sample then and there, into three parts and mark and seal or fasten up each part in such a manner aa its nature permits; and

(c) (i) deliver one of the parts to the person from whom the sample has been taken;

(ii) send another part for analysis to the Public Analyst; and

(iii) retain the third part for production in case any legal proceedings are taken or for analysis by the Director of the Central Food Laboratory under subsection (2) of Section 13, as the case may be.

According to the learned Counsel, once ad application is made by the accused, it becomes binding on the court to send the sample, preserved under Sub-clause (iii) of Clause (c) of sub^section (1) of Section 11, to the Director of the Central Food Laboratory for analysis. I am, however, unable to accept the contention that an accused has a right to get the sample preserved under Sub-clause (iii) to be sent for analysis to the Director of Central Food Laboratory. The right of the accused is to get the sample with him sent lor test, and the right of the complainant is to get the third sample with him sent for test in case he wants to challenge the finding of the Public Analyst learned Counsel for the Applicant in support of Ms contention has placed reliance on some observations in the judgments noted below.

9. In the case of Cnfntamani v. State (1064 All LJ 803), application was moved by the accused stating that his bottle of the food sample had broken and that the Food Inspector be directed to produce the sample maintained by him Cor being sent to the Director for analysis. The Court directed the complainant to produce the bottle but the complainant did not produce it and stated that it was not being produced as it was not traceable. The learned Judge of this Court gave the accused the benefit of doubt for the non-production of the bottle. Reliance was placed on the words of Sub-clause (iii) of Section 11(1)(c) which required the third

pert to be retained for production or for analysis. No doubt there are some observations to the effect that the sample, if produced, could have been seat for analysis. The case was decided on the complainant's failure to produce the sample and the consequential advent inference drawn from this circumstance by the Court. This case really turned on the non-production of the sample phial and not on the baste of the denial of a right of the accused. In Nagar Swasthya AdM-fcari v. Earn Phal 1969 All WR (HC) 850, one of the grounds of acquittal was that the third part of the sample retained in the office of the Nagar Swasthya Adhikari had not been produced before the Magistrate as required by Section 11(1)(c)(iii) of the Act. this Court considering the provision held that the third part is re-tamed fcr two purposes, namely, either for production or for analysis by the Director. It was further held that it was not necessary that the Food Inspector must produce the third part of the sample at the time of the moving of the complaint or during the trial. It could be produced on the order of the Court. Non^production of the sample was not held to be a ground sufficient for acquittal. In the case of Modi Dahyabhai Aaaibalal v. Jayanti Lai C. Shah 1968 Cri LJ 829 (Guj) learned Judge of the Gujarat High Court took the view that either party can ask for the sending of the third part of the sample to the Director for analysis under Section 13(2) of the Act. Bat this was held on tfw basis that the sample had already ' been produced by the complainant in Court The relevant sentence is as under:

In the present case it appears rightly or wrongly that the complainant had chosen to produce the third sample 1bottle which had been retained by him and it is that sample bottle which the accused insisted on being sent for analysis to the Director of the Central Food Laboratory under(2) of Section 13 Sub-section of the Act.

10. All the aforesaid three oases show that once the sample comet in osutrt, it may be dealt with toy the court in any manner it deems proper, and from the circumstance of it not being produced ot not being sent for analysis, courts may draw inference as may be deemed proper.

11. In the case of Ranibir g v. State, 1968 All Cri B 366: (1370 Cri LJ 82), the third sample was sent Cor test to the Director of the Central Food Laboratory at the instance of the Accused That report -also went against the accused. The accused

then prayed that the sample kept with him may be sent for teat in this Court held that the accused cannot ask for -a test of the sample twice by tine Director of the Central Food laboratory. As the third sample had already been sent at the accused's request, the question about the right of the accused did not arise in the case. The case really decided whether the second attempt is permissible or not.

12. To the contrary, there are the decisions of the Supreme Court atid Kerala High Court which go to establish that the accused's right is only to get the sample with him tested1 under Section 13(2) of the Act. In the case of Municipal Corporation of Delhi v. Ghisa Ram : 1967 CriLJ939 , it was observed:

There can be no doubt that sulb-sec-tion (2) of Section 13 of the Act confers a right on the accused vendor to have the sample; .jiven to him examined by the Director of the Central Food Laboratory and to obtain a certificate from him on the basis of the analysis of that sample.

Again, it was observed.

It appears to us that when a valuable right is conferred by Section 13(2) of the Act on the vendor to have the sample given to him analysed by the Director of the Central Food Laboratory, it is to be expected that the prosecution will proceed in such a manner that that right will not be denied to him....Obviously, the right has been given to the vendor in order that, for his satisfaction, and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by Court as conclusive evidence.

13. In Food Inspector, Cannanore Municipality, Cannanore v. Pandavalap-pil Kannan : AIR1966 Ker70 , it was observed that if the accused thought that the sample bottle forwarded to the Food Analyst was tampered, he could well have taken steps to send the sample with him for analysis as provided under Section 13(2) of the Act. It is apparent from these cases that the right given by Section 13(2) of the Act to the accused is to get the sample with him analysed by the Director in case he feels dissatisfied with the report of the Public Analyst. A similar right is given to the complainant to get the sample analysed which is kept with him if he feels dissatisfied with the report of the Public Analyst. A plain reading of Sub-

section (2) of Section 13 leads to this very conclusion, because it mentions the two persons who can get the sample examined and then the description of the samples is given with reference to Section 11 of the Act. The sample is to be sent at the request of the party after the court examines the .seals. The purpose of this provision is to enable either party to get the report of the Public Analyst checked by a higher authority, and also to give the accused the further right to check that the sample was not tampered or changed by the complainant before it was sent to Public Analyst. The accused^ is given the right to get the sample with him tested for either purpose. If this were not the intention, the right could foe easily frustrated by either party by just tampering the seals because once the .Court finds that the seals were not intact, it would not send the sample for analysis. The wordings of subsection (2) clearly indicate that it is a right of the party possessing the sample to come to Court, show to it that the seals are intact and' to get the sample tested through the agency of the court by the Director of the Central Food Laboratory. It does not give a right to either party to get the sample in the possession of the other side tested. Had it not been so, even the complainant will have a right to get the sample with the accused sent for the test. This will be forcing the accused to tender evidence or to make evidence available against himself for being produced in the case after he has been charged with the commission of an offence. This would, if not directly, impliedly, amount to testimonial compulsion prohibited by Article 20(3) of the Constitution which provides that no person shall be compelled to be a witness against himself.

14. For all these reasons, I am of the view that the omission of the Court in directing the third sample kept with the Food Inspector to foe sent to the Director for analysis under Section 13(2) of the Act does not amount to such an illegality as may vitiate the trial.

15. The accused was further not, entitled to get the benefit of Section 13(2) of the Act as he had not made the payment of the prescribed fee. The appellate court has found that the requisite fee had not been deposited. In the case of Ajitprasad Ramkrishan Singh v. State of Maharashtra : 1972 CriLJ1026 , dealing with the right of the accused to get the sample sent for analysis to the Director, it was observed:

It is clear from the sub-section that the appellant should have made an application after paying the prescribed fee if he wanted the part of the sample avail- able with him to be sent to the Director for analysis. If he had made the application after paying the prescribed fee, Hie Magistrate would have had no option but to send the part of the sample for analysis by the Director.

this Court also took the same view in Netrapal v. Nagar Swasthya Adhikari, Agra, 1969 All WR (HC) 902. In the present case, no fee was deposited.

16. Moreover the application was made after the expiry of 11 months as is clear from the order on the application and also from the judgment of the learned Magistrate. The observation of the appellate court that it was made earlier is not borne out from the record. According to decisions of this Court milk starts decomposing after ten months. The accused had the opportunity to ask for test by the Director within ten months, but he did not. As the application was made much after ten months, no prejudice can be said to have been caused to the applicant by the Magistrate's failure to send the sample to the Director even if it be held that the accused had a right to get the third sample examined by the Director of the Central Food Laboratory,

17. As regards the defect in the charge, learned Counsel contended that it was not stated in the charge how the milk was found to be adulterated Le. it was not indicated that it was deficient in fat contents. In support of this contention learned Counsel has relied on a decision of this Court in Girwar v. State, 1971 All Cri C 1474. That case is, however, not applicable as from the portion of the charge quoted in the judgment it appears that no reference was made in the charge to the report of the Public Analyst. In the present case, the charge did make a reference to the report of the Public Analyst, which had already been handed over to the accused. The accused was duly in know of the report of the Public Analyst and therefore suffered no prejudice by the omission of the details in the charge regarding the manner of adulteration.

18. The sentence awarded to the applicant is already the minimum prescribed by law. learned Counsel contends that because the applicant has remained out for so long and will have to go to jail now after about 5 years the sentence of

imprisonment should not be maintained. T do not think that the accused's remaining out on bail can be regarded either as an adequate or a special reason for reduc- ing the sentence of imprisonment below the minimum prescribed by law. The reason for giving a shorter sentence must have some nexus either with the circumstances in which the offence was committed or the personality of the accused. In the present case, there is no special circumstance justifying the award of a sentence below the minimum. If the accused himself applies for being released on bail and remains on bail, he cannot Later come forward and claim that his being on bail be regarded as a special reason for awarding him a sentence below the minimum prescribed by law.

19. The age of the applicant is 35 years and there is no circumstance to justify the grant of probation to him under the U.P. First Offenders Probation Act. The offence of Food Adulteration has a wide adverse impact on society and it is for this reason that the law has prescribed a minimum penalty. In cases of food adulterations unless there is some special circumstance, such as tender age of the applicant, the imposition of sentence cannot be deferred.

20. In the result, the revision fails and is dismissed. The applicant is on bail, he shall be taken into custody to serve out the sentence awarded to him.

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