

Abdul Moid and ors. Vs. the State

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SooperKanoon Citation : sooperkanoon.com/469927

Court : Allahabad

Decided On : Sep-23-1976

Reported in : 1977CriLJ1325

Judge : G.D. Srivastava, J.

Appellant : Abdul Moid and ors.

Respondent : The State

Judgement :

ORDER

G.D. Srivastava, J.

1. The applicants in this revision are Abdul Moid, Abdul Majeed, Mohd. Amin and Mohd. Fareed, Messrs. Button House is also one of the applicants. It appears that this firm is an unnecessary party, simply because there is no order of conviction against the firm. The admitted facts of the case are that a firm known as Messrs Button House used to carry on the business of selling certain drugs and other articles in the locality known as Hazratganj in the city of Lucknow. The partners in this firm are Abdul Moid, Abdul Majeed Mohd. Saeed and Mohd. Amin. On 12-8-1971, the Drug Inspector purchased a drag named Boroline from the said business premises for a sum of Rs. 1.50 and obtained a cash memo. The Inspector again visited the firm on 20-8-1971 and seized the remaining stock of the said drug which was being exhibited for sale and stock in the premises of the

said firm. It is alleged that the said firm did not possess any licence to sell, stock or exhibit for sale the drug named as Boroline and it was also alleged that the price charged for the drug was in excess of the maximum retail price. A complaint was filed by the Drug Inspector on 20-3-1972 before the City Magistrate with the allegation that the firm and the partners had contravened certain provisions of the Drugs and Cosmetics Act of 1940, Drugs (Price Control) Order, 1970 and the Essential Commodities Act. The person who actually sold the drug was applicant Mohd. Fareed. It may be noted that one Mohd. Saeed was also prosecuted and convicted by the trial court but his appeal was allowed by the learned Sessions Judge, who, however maintained the conviction of the present applicants. The fine imposed by the trial court was reduced to Rs. 125/- under the Essential Commodities Act and Rs. 375/- under the Drugs and Cosmetics Act.

2. It seems to be admitted that one tube of Boroline was sold by Mohd. Fareed to the Drug Inspector for a sum of Rs. 1.50 on 12-8-1971. It is also admitted that this tube was sold in the premises known as Messrs. Button House and the partners of this firm are Mohd. Saeed, Abdul Moid, Abdul Majeed and Mohd, Amin. Again it is further admitted that the firm had no licence for selling Boroline and that the price charged was in excess of the price noted on the tube plus taxes. The main point which was raised by the learned Counsel for the applicants was that Boroline was not a drug as defined by Section 3(b) of the Drugs and Cosmetics Act, 1940. Sub-clause (1) of Clause (b) defines drug as medicine for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals. I need not refer to Sub-clause (2) because this relates to certain substances which are used for destruction of vermin or insects. The learned Counsel for the applicants argued that Boroline was essentially a cosmetic with antiseptic qualities and that it could not be used for treatment or prevention of any disease in human beings. It may also be, therefore, necessary to refer to the definition of Cosmetics in the said Act. A Cosmetic has been defined as an article which is intended to be rubbed, poured, sprinkled or sprayed or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance. It has now therefore to be found out whether Boroline is really meant to be used as a cosmetic or a drug.

3. A perusal of the carton and the leaflet enclosed will show that this article contains :

(1) Boric Acid ;

(2) Zinc Oxide ;

(3) White petroleum Jelly and

(4) anhydrous lanalyn I. R. The leaflet accompanying the tube says that Boroline can be used to cure minor sores on the ears and sores between toes. It can also be used to relieve minor skin injuries and to guard against possibilities of infection in cuts. Apart from these curative and preventive properties, Boroline can also be used to sooth dry skin and as protective against sun burns. The learned Counsel for the applicants, therefore, contended that prevention of infection was not the same thing as prevention of : disease and that Boroline did not claim to be a medicine for curing any disease. To me it appears that the Act wanted to classify such articles in two parts, namely, cosmetics and drugs. It is evident that Boroline is not recommended to be used by the makers thereof for beautifying or promoting attractiveness, nor can it be used for cleansing any part of the human body. It is, therefore, very difficult to say that it can be classified as a cosmetic. It is true that prevention of disease is not quite the same thing as prevention of infection. But in my opinion, prevention of infection is certainly a prevention of disease in another form, simply because disease follows infection. Boroline does claim to cure certain skin ailments, such as, sores and it of course cannot be denied that it claims to be an antiseptic and is recommended to be used for preventing of infection in cases of minor cuts and minor skin injuries From the formula as mentioned on the carton, it prima facie appears that Boroline contains certain medicines. I, therefore, find nothing wrong with the legal position as appreciated by the two courts below.

4. The learned Counsel for the applicants also urged that conviction under the Essential Commodities Act was illegal, because drug was not included in the list of Essential Commodities before 1974. This argument cannot be accepted because the Drugs Control Order was made in 1970 Under Section 3 of the Essential Commodities Act. Section 7 of this Act says that contravention of any order made

Under Section 3 is punishable. Thus the question whether drug was or was not an essential commodity in 1972 is immaterial.

5. The last point raised was that there was absence of mens rea, because it could not be said that the offence had been committed intentionally. It is true that for an article like Boroline, it is not very easy to determine whether it is a drug or a cosmetic. It is, therefore, quite possible that the applicants may be under a bona fide belief that Boroline is a cosmetic and does not, therefore, require any licence.

6. Regarding offences by firms, reference should be made to Section 10 of the Essential Commodities Act and Section 34 of the Drugs and Cosmetics Act, which say that every person, who was in charge of the conduct of business of the firm shall be deemed to be guilty besides the firm itself. It would not be fair to convict all the partners of the firm, because there is always a possibility that all the partners of the firm may not even be knowing what is really going on in the firm. There is only one circumstance which may go to show that the business of selling was being actually carried on by Abdul Majeed, because the licence for selling certain drugs stands in his name only. The trial court erred in acquitting the firm, but because there is no State Appeal against the acquittal, that acquittal cannot be disturbed now. The only other person who can be held liable is the man who actually sold the said drug. Taking into consideration the fact that the offence was not committed deliberately and intentionally, I think that the fine should also be reduced to half.

7. In the result, the revision is allowed to this extent that while the conviction of applicants Abdul Majeed and Mohd, Fareed are maintained, Each of them is ordered to pay a fine of Rs. 175/- under the Drugs and Cosmetics Act and Rs. 75/- under the Essential Commodities Act. The conviction and sentence of Abdul Moid and Mohd. Amin are set aside. The fine, if already paid by them, shall be refunded. Abdul Majeed and Mohd. Fareed should deposit the fine as imposed by this Court within a period of two months from the date of receipt of the record by the court below and in case of default, they shall undergo rigorous imprisonment for one month each.

